



North Central Regional Transit District (NCRTD)

Resolution No. 2014-23

**Resolution No. 2014-23 Repealing NCRTD Board Resolution No. 2012-21 in Its Entirety
and Adopting New Procurement Regulations**

WHEREAS, the NCRTD was created through legislative enactment (chapter 65, signed March 21, 2003); and,

WHEREAS, the NCRTD is a sub-division of the State of New Mexico; and,

WHEREAS, the NCRTD was approved and certified by the New Mexico Department of Transportation Commission September 14, 2004; and,

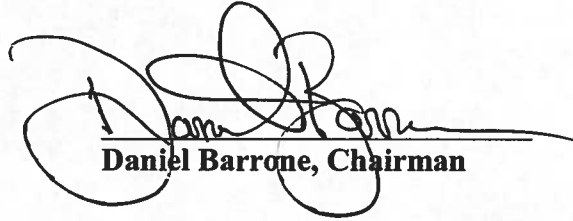
WHEREAS, the NCRTD adopted regulations governing Procurement by Resolution No. 2007-13 on September 14, 2007 and Resolution No. 2012-21 on September 7, 2012; and,

WHEREAS, the state statutes governing procurement provide for local public bodies such as the NCRTD to enact their own policies and regulations for public purchasing consistent with state law; and,

WHEREAS, adoption of these updated Procurement Regulations will provide for the fair and equitable treatment of all persons involved in public purchasing by the NCRTD, to maximize the purchasing value of public funds in procurement and to provide safeguards for maintaining a procurement system of quality and integrity.

NOW THEREFORE BE IT RESOLVED THAT the Board of Directors of the NCRTD, hereby adopts the revised Procurement Regulations as attached hereto, and related state and federal forms which may be required to change from time-to-time.

PASSED, APPROVED, AND ADOPTED BY THE GOVERNING BODY OF THE NORTH CENTRAL REGIONAL TRANSIT DISTRICT ON THIS 5TH DAY OF DECEMBER, 2014.



Daniel Barrone, Chairman

Approved as to form:



Peter Dwyer, Counsel

North Central Regional Transit District

Procurement Regulations

Adopted by Resolution No. 2012-21

Proposed Amendments 11/2014

Section 1. Purchasing Procedures

ARTICLE I. PROCUREMENT

1. Purpose.

The purpose of this Procurement Policy is to provide for the fair and equitable treatment of all persons involved in public purchasing by the District, to maximize the purchasing value of public funds in procurement and to provide safeguards for maintaining a procurement system of quality and integrity. As provided in Article X, Section 6, of the Constitution of the State of New Mexico, in Section 13-1-98K NMSA 1978, the District may exercise all legislative powers and perform all functions not expressly denied by general law or by other provisions of the District Bylaws. In the absence of the exercise of any such power, the District may act in the manner provided by law. To that end, this article shall govern all purchasing transactions of the District and shall serve to exempt the District from all provisions of the New Mexico Procurement Code, Secs. 13-1-28 through -199 NMSA 1978.

2. Applicability of article provisions.

This article applies to the procurement of goods, services or construction, entered into by the District after the effective date of the adopting resolution. It shall apply to the expenditure of public funds for public purchasing irrespective of the source of the funds.

When the procurement requires the expenditure of federal assistance or contract funds, the procurement shall be conducted in accordance with any mandatory applicable federal law and regulations. When the funding source for the procurement requires that the State Procurement Code and other State purchasing requirements be followed then the District will following such regulations of authorities having jurisdiction over those applicable items(s) and deemed to be included in this Procurement Regulation.

In the event of any inconsistency between the terms and conditions of this article and those of the federal contract, the latter will govern. The District may comply with the terms and conditions of any grant, gift or bequest that is consistent with law.

- (a) These provisions shall apply to all employees or other users authorized to make purchases and all parties whose bid, offer or contract subjects them to these provisions.
- (b) Purchasing for private or personal use, or use of the procurement process for such purpose, is prohibited.
- (c) Enforcement and penalties – All managers, authorized users, and their supervisors are responsible for knowing, understanding, and adhering to the provisions of this article.

(d) Any person having knowledge of a deviation from these provisions shall report such to the Executive Director.

(e) Criminal violations can result in prosecution or penalties.

3. Exemptions.

(a) No provisions of the Procurement Policy except Section 8 and Article II, shall apply to the following purchases:

- (1) Advertising;
- (2) Bond and debt service fees;
- (3) Books, periodicals, publications and subscriptions;
- (4) Credit or procurement card services;
- (5) Employee work-related travel allowances and expenses;
- (6) Freight and delivery charges;
- (7) Instruction/education/training, any and all related fees, excluding employee travel;
- (8) Insurance premiums;
- (9) Legal and related costs incurred by the District, including expert witness costs and interpreters' fees, printing/duplicating costs, arbitrator/mediator, process server, court reporter, transcriptions, and settlements, hearing officer (s), but not including attorney contracts (see (b)(5) below);
- (10) Medical services and emergency medical services for and incidental to utilizing licensed medical professionals, but not including routine medical and psychological exams or lab tests pursuant to drug testing, pre-hire examinations or examinations related to reasonable accommodation;
- (11) Memberships and dues;
- (12) Travel or shipping by common carrier or by private conveyance or to meals and lodging;
- (13) Office equipment repair and maintenance contracts;
- (14) Postage or meter refills;
- ~~(15)~~ Real property;
- ~~(16)~~ Information Technology Maintenance Services;
- ~~(17)~~ Employment Agreements or Contracts;
- ~~(15)(18)~~ Collective Bargaining Agreements or Contracts;
- ~~(19)~~ Software and firmware updates or upgrades, minor;

(20) Purchases of parts and labor for equipment or machinery where a breakdown of this equipment or machinery could cause an emergency or costly condition to exist and where the machinery or equipment is in immediate danger of failure;

(21) Purchases of parts and labor or maintenance agreements to repair disabled equipment or machinery if the equipment or machinery is repaired by a franchised dealer or by a factory authorized repair shop;

~~(16)~~ —

(22) Agreements for the services of lobbyists;

~~(17)~~(23) Taxes, licenses and filing fees;

~~(18)~~(24) Purchases of publicly provided or publicly regulated gas, electricity, water, sewer and refuse collection systems and telecommunications services.

(b) No provisions of the Code, except Section 8 and Article II, shall apply to the following purchases, provided, however, that such purchases shall require a purchase order:

- (1) Procurement of items of goods or services from a federal or state agency or other public entity.
- (2) Procurement of goods, services, or construction items under existing contracts and that are procured under any of the following conditions:
 - a. At a price equal to or less than the contractor's current federal contract price (GSA, FSS), providing the contractor has indicated in writing a willingness to extend such contractor pricing, terms and conditions to the District ; or
 - b. With a person that has a current contract with the state Purchasing Agent or any other New Mexico governmental entity, for the item, services or construction meeting the same standards and specifications as the items to be procured; or
 - c. With a person that has a current contract issued under a cooperative purchasing agreement with another public entity; or
 - d. With a person that has an existing contract, that was subject to competitive solicitation, with another government or agency thereof.
- (3) Purchases of motor fuels and compressed fuel gases.
- (4) Works of art for public display.
- (5) Legal services.
- (6) Goods for resale.
- (7) Unscheduled repairs which necessitate disassembly diagnostics.
- (8) Contracts for televising or documenting public meetings.

- (9) The Finance Manager shall retain the documentation relied upon to procure goods, services or construction without seeking competitive bids or proposals for public inspection and auditing purposes in accordance with established District records retention standards.

4. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Architect services means services which require a valid state license related to the art and science of designing and building structures for human habitation or use and may include planning, providing preliminary studies, design, specifications, working drawings and providing for general administration of construction contracts.

Authorized User means an employee who has been approved by management, and has received mandatory training in procurement, to conduct departmental purchasing.

Bid means a formal quote with a pre-determined set of specifications to which a bidder must answer or comply, which details the goods or construction, and the price of the items solicited.

Blind trust means an independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in, or other disposition of, the property subject to the trust.

Brand name or equal specification means a specification limited to one or more items by manufacturers' names or catalogue numbers to describe the standard of quality, performance and other significant characteristics needed to meet District requirements, and which provides for the submission of equivalent products.

Brand name specification means a specification limited to one or more items by manufacturers' name or catalogue number.

Change order means a written order to the contractor authorizing an addition, deletion, or revision in the work within the scope of the contract documents, or authorizing an adjustment in the contract price or contract time.

Confidential information means any information which is available to an employee only because of the employee's status as an employee of the District and is not a matter of public knowledge or available to the public on request.

Construction means the process of building, altering, repairing, installing, improving or demolishing any public structure or building, or other public or private improvements of any kind to any public real property. It does not include the routine operation or routine maintenance of existing structures, buildings or real property.

Construction management services may include but are not limited to performance of the following activities by the construction manager: monitoring and coordinating the work, schedules, personnel, equipment and materials of contractors with the activities of the District ; developing and monitoring project costs, change orders and pay requests; insuring compliance with all contract documents and applicable laws, rules and regulations.

Contract means any type of District agreement, regardless of its title, for the procurement of goods, services, or construction. This term shall not include employment agreements or collective bargaining agreements.

Contract modification (bilateral change) means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity or other provisions of any contract accomplished by mutual action of the parties to the contract.

Contractor means any person as defined below who has a contract with the District.

Cooperative purchasing means the use of a properly executed purchasing agreement with one or more additional public agencies to execute procurement.

Cost analysis means the evaluation of factual information concerning the cost of labor, material, overhead and other cost elements including profit which are expected to be incurred or which have been actually incurred by the contractor in performing the contract.

Cost-reimbursement contract means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of the procurement code, and a fee or profit, other than a fee based upon a percentage of cost, if any.

District means the North Central Regional Transit District.

Definite quantity contract means a contract which requires the contractor to furnish a specified quantity of goods, services, or construction at or within specified time.

Direct or indirect participation means involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing or in any other advisory capacity.

Dollar levels mean United States currency, and all amounts shall be considered without New Mexico gross receipts tax (NMGRT).

Employee means an individual drawing a salary or wages from the District, whether appointed or not; any non-compensated individual performing services for the District or any department, or entity established by the executive or legislative branch of the District; any non-compensated individual serving as an Director or Official Designee of the District.

Engineering services means any service or creative work, the adequate performance of which requires a valid state license and engineering education, training and experience in the application of special knowledge of the mathematical, physical and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning and design of engineering works and systems, engineering studies and the review of construction for the purpose of assuring substantial compliance with drawings and specifications; any of which embrace such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects and industrial or consumer products or equipment of a mechanical, electrical, hydraulic, chemical, pneumatic or thermal nature, insofar as they involve safeguarding life, health or property, and including such other professional services as may be necessary to the planning, progress and completion of any engineering services. Such practice may include but is not

limited to the performance of architectural work incidental to the practice of engineering. Engineering services does not include responsibility for construction management services, site conditions, operations, equipment, personnel or the maintenance of safety in the work place.

Evaluation committee means a committee appointed for the purpose of evaluating responses to bids or proposals and to determine, in writing, which is the most advantageous to the District based on the evaluation factors set forth. The evaluation committee members will remain constant through award. Except as specified in Section 38 (b) of this Procurement Policy, the evaluation committee shall be appointed by the department manager for whose department the goods, services or construction are to be purchased.

Financial interest means:

- (1) Holding a position in a business as officer, director, trustee, or partner, or holding any position in management, or ownership of more than five percent interest in a business; or
- (2) Any interest which may yield, directly or indirectly, any material benefit to an employee or to the employee's immediate family any interest other than an interest in a mutual fund or one held in a blind trust.

Goods means all tangible items, other than real property or construction, having a physical existence including, but not limited to, supplies, parts, equipment, materials, and printed materials.

Gratuity or Kickback means a payment, loan, subscription, advance, and deposit of money, service or anything of more than a nominal value, present or promised, unless consideration of substantially equal or greater value is received.

Immediate family means a spouse, children, parents, brothers and sisters, parent in-law, grandparent, grandchild, and step-relatives in a like relationship.

Indefinite delivery/Indefinite quantity or IDIQ contract means a contract which requires the contractor to furnish an indeterminate quantity of specified goods, services, or construction during a prescribed period of time at a definite unit price or at a specified discount or similar pricing structure from list or catalog prices.

Inventory means goods purchased for storage, issue, and ready use by users of the District.

Invitation for Bids or IFB means all documents, whether attached or incorporated by reference, utilized for soliciting competitive sealed bids.

Multiple source award means an award to more than one bidder or offeror of a contract for one or more similar goods, services, or construction.

Person means any natural person, corporation, partnership, sole proprietorship, joint stock company, joint venture, private legal entity, or any federal, state or local political subdivision or entity thereof.

Price or Pricing structure means a pre-determined method, such as percentage charged for a category of items; or dollar amount as an itemized price listing, or as related to quantity, unit pack, or similar distinction, for which a vendor is willing to provide the District goods, services, or construction.

Price agreement means a form of IDIQ contract.

Price analysis means the evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in determining prices to be paid and costs to be reimbursed.

Pricing data means factual information concerning prices for items substantially similar to those being procured. Prices in this definition refer to offered or proposed selling prices, historical selling prices and current selling prices. The definition refers to data relevant to both prime and subcontract prices.

Procurement means the buying, purchasing, renting, leasing, or otherwise acquiring of any goods, services or construction. It also includes all functions that pertain to the procurement process, including description of requirement, and awards of contract.

Professional services means the services of practitioners in a field requiring a state license, or an advanced degree, or a highly specialized education, or a nationally recognized certification; or person providing such services. This term shall not include services provided by an employment agreements or contracts or collective bargaining agreements or contracts.

Project means an activity with an explicit goal, that has a defined beginning and an end, that has at least one concrete deliverable, that has a logical sequence of activities that produce the deliverable(s), and that is not a repetition of an activity that has been previously planned and performed.

Project Manager means the person assigned the responsibility for overall supervision of a Project. The responsibility includes, but is not limited to, budget monitoring, change order control, project schedule, quality control, approving progress payments, and insuring that work progresses in accordance with requirements set forth in the contract documents.

Proposal means a quote which may include open-ended, substantially bidder-determined specifications for how the bidder will provide the item(s), or different weights on different factors for evaluation; which details the goods, services, or construction, and the price of the items solicited.

Public agency or entity means a public entity subject to or created by any federal, state, or local governmental body.

Purchase order or PO means the legally binding document issued by the Finance Office, which has been appropriately approved before submission to a vendor, that authorizes a contractor or vendor to deliver goods, services or construction. There are two types:

- (1) Regular (fixed amount and cost) – one which is used to procure a predetermined quantity at a predetermined price; and
- (2) Open or Blanket Purchase Order – one which is used for anticipated numerous or recurring small purchases at a predetermined price or pricing structure for up to one year. It is a type of IDIQ contract.

Qualified products list means an approved list of goods, services or construction items described by model or catalogue numbers which, prior to competitive solicitation, the Purchasing Agent has determined will meet the applicable specification requirements.

Quote means a binding, good-faith statement of the price at which a vendor is willing to provide to the District required goods, services, or construction.

Request for Information / Interest or RFI means all documents, whether attached or incorporated by reference, utilized for soliciting information to be used in developing specifications or a scope of work for services for an IFB, RFP, or RFQ, or for gauging interest in a future solicitation.

Request for Proposals or RFP means all documents, whether attached or incorporated by reference, utilized for soliciting proposals for goods, services or construction.

Request for Qualifications or RFQ means all documents, whether attached or incorporated by reference, utilized for soliciting Statements of Qualifications for professional services.

Responsible bidder or offeror means a person, who has been determined by the Purchasing Agent or evaluating committee to have the capability in all respects to perform fully the contract requirements, including the financial resources, personnel, service reputation and experience, capacity, production or service facilities, equipment and credit which will ensure satisfactory delivery of the goods, services or construction described in the IFB or in the RFP.

Responsive bidder means a person who has submitted a bid that conforms in all material respects to the requirements set forth in the IFB. Material respects of a bid may include but are not limited to, price, quality, quantity, and delivery requirements.

Responsive offeror means a person who has submitted an offer that conforms in all material respects to the requirements set forth in the RFP.

Rough order of magnitude estimate means an approximation without detailed data backup; has a range of accuracy equal to -25% to +75%.

Services means the furnishing of labor, time or effort, by contractors other than those providing professional services, services of employees of a state agency or local public body, or construction.

Software or firmware update or upgrade means an improvement to the functionality or security of computer software. There are two basic types:

- (1) Minor – one in which the underlying software remains the same, and is usually identified by an incremental number change, such as “.1” or “.02”.
- (2) Major – one in which the software itself changes, either to a new operating system or as a new version, typically identified such as “Version 8” or “Name 2012”.

Sole source selection means a one-time procurement which is subject to the following conditions:

- (1) A good-faith review of available sources has been conducted, and
- (2) A Letter or Memo of Justification is provided to the Finance Manager and Executive Director as documentation detailing the reason(s) why the source is the only one in the USA that provides the good(s) or service(s).

Specification means any description of the physical or functional characteristics or of the nature of a good, service or construction item. It may include a description, any requirement for inspecting, testing or preparing a good, service or construction item for delivery.

Statement of Qualifications or SOQ means a formal documentation of experience or expertise for the purpose of obtaining information to permit the evaluation of the person most highly qualified to provide the required services.

Surveying services means any service or work, the substantial performance of which involves the application by a state-licensed surveyor of the principles of mathematics and the related physical and applied sciences.

Task order or Job order means a discrete assignment of a specific set of tasks under an Indefinite Delivery/Indefinite Quantity contract, each order capped at a not-to-exceed amount.

ARTICLE II. OFFICE OF THE PURCHASING AGENT

5. Establishment.

The responsibility for administration of the provisions of this policy shall be under the Executive Director. The Executive Director shall have the responsibility and authority to insure that all provisions of law and this policy are followed and shall be authorized to issue any supplemental regulations consistent with this policy deemed necessary to administer, manage or clarify this Policy. Supplements issued by the Executive Director shall be attached to and made a part of this Policy. The Executive Director shall be responsible for having the knowledge to insure that all provisions of this Policy and all other purchasing concerns and activities of the District are appropriate and consistent with the most current, generally accepted purchasing techniques, and all provisions of the law.

There shall be a Purchasing Agent. The Purchasing Agent shall be the Executive Director who is the principal public purchasing official and whom may delegate these responsibilities to other staff as he may deem necessary and who herein will be known as the Purchasing Agent for purposes of this Policy.

6. Authority and duties.

- (a) *Principal public purchasing official.* Except as otherwise provided in this Article, the Purchasing Agent shall serve as the principal public purchasing official for the District and shall be responsible for conducting or supervising the procurement of goods, services or construction in accordance with this Article, as well as the disposal of surplus goods.
- (b) *Duties.* In accordance with this article, and subject to the supervision of the Executive Director or his designee, the Purchasing Agent shall:
 - (1) Award purchase orders for procurement of all goods, services or construction needed by the District, upon approval of departments or the Executive Director as required consistent with operational procedures;
 - (2) Develop procedures to sell, trade, or otherwise dispose of surplus goods belonging to the District;
 - (3) Establish and maintain programs for specifications development, contract administration and inspection and acceptance, in cooperation with the public agencies using the goods, services or construction;
 - (4) Conduct mandatory training sessions for new authorized users, and periodic training for all current authorized users;
 - (5) Review all procurement requests for correctness, appropriateness, and compliance with this Policy; and
 - (6) Establish and administer a District Procurement Card program.
- (c) *Operational procedures.* Consistent with this article, the Purchasing Agent may adopt operational procedures relating to the execution of his or her duties.

7. Delegations to other District officials.

The Purchasing Agent may delegate authority to purchase certain goods, services or construction items to other District officials, if he or she deems such delegation necessary for the effective procurement of those items. This delegation will be in writing describing the authority granted. Notwithstanding the provisions of Section 6, procurement authority with respect to certain goods, services or construction may be delegated to other District officials by the Executive Director. This delegation will be in writing describing the authority granted.

8. Authority to execute contracts.

(a) *Purchase orders.* The District Board hereby delegates to the Executive Director the authority to execute purchase orders and bind the District.

(b) *Contracts.*

(1) For contracts the District Board hereby delegates to the Executive Director or designee the authority to execute the following contracts and bind the District:

- a. Contracts other than purchase orders as provided in this Section, in the amount of \$100,000.00 or less;
- b. Any contract for the purchase of goods or construction in any amount less than or equal to the funding budgeted and specifically appropriated by the District Board for the acquisition or project;
- c. Change orders or contract modifications to existing contracts, provided that the total amount after execution of the change order or contract modification does not exceed the funds budgeted or the adjusted budget and specifically appropriated for the project.

(2) The authority granted in Subsections (b) (1) is subject to the following conditions:

- a. The goods, services, or construction was procured in accordance with this chapter as determined by the Purchasing Agent;
- b. The contract is in a form acceptable to the District's Legal Counsel;
- c. There is no local, state or federal requirement that the chief elected official or other official must sign the contract;
- d. Approval by the District Board if the purchase is in excess of \$100,000.00.

(3) The Executive Directors power to delegate authority to execute contracts is limited to the contract amount of \$100,000.00, exclusive of NMGR, or less.

(4) All other contracts must be approved by the District Board prior to execution by the Executive Director, as appropriate.

ARTICLE III. SOURCE SELECTION AND CONTRACTS

9. Competitive sealed Invitations for Bids (IFBs).

The Purchasing Agent shall be responsible for developing procedures for processing, recording and securing all documents for bids. Confidential information shall be identified as such by the bidder, and subject to state laws regarding its handling. The user department manager shall appoint the bid evaluation committee and committee chairperson.

- (a) *Conditions for use.* All contracts of the District shall be awarded by competitive sealed bidding except as otherwise provided herein.
- (b) *Invitation for bids.* An IFB shall be issued and shall include specifications and a sample of the standard contractual terms and conditions applicable to the procurement.
- (c) *Public notice.* Adequate public notice of the IFB shall be given a reasonable time, but not less than 15 calendar days prior to the date set for opening of the bids. Resolicitations shall be given public notice for a minimum of 10 days prior to the date set for opening of the bids. The publication of such notice shall be in a newspaper of general circulation within the District. Such public notice shall state the title, place, date and time of bid opening.
- (d) *Bidders list.* The Purchasing Agent shall send copies of the IFBs to include, but not be limited to, those persons that have formally requested from the District the IFB documents for submitting bids for particular categories of goods, or construction, and which have paid in advance any required fees. The Purchasing Agent may set fees or deposits for different IFBs. Such fees shall be related to the actual direct cost of furnishing copies of the IFBs to the prospective bidders. Any deposit, less delivery charges, shall be refunded if the documents for bid are returned in usable condition within the time specified in the documents for bid, which time limits shall be no less than ten calendar days after the date of the bid opening. All forfeited deposits shall be credited to the District.
- (e) *Bid opening.* Bids shall be opened publicly in the presence of two or more District employees and any public present, including bidders, at the time and place designated in the IFB. The names of the witnesses will be made a part of the record, and any public present, including bidders or offerors, will be given the option to record their names. The amount of each bid and such other relevant information as the Purchasing Agent deems appropriate consistent with the Inspection of Public Records Act, § 14-2-1 et seq., NMSA 1978, together with the name of each bidder, shall be recorded. The record and each bid shall be open to public inspection in accordance with the Inspection of Public Records Act.
- (f) *Bid acceptance and bid evaluation.* Bids shall be unconditionally accepted without alteration or correction, except as authorized in this Article. Bids shall be evaluated based on the requirements set forth in the IFB, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total of life cycle costs. The IFB shall set forth the evaluation criteria to be used. Only criteria that are set forth in the IFB may be used in bid evaluation. Interviews are to be used only for the purpose of clarification. The final evaluation results shall be forwarded to the Purchasing Agent.
- (g) *Withdrawal of bids and cancellation of awards.* Bidder may withdraw its bid by written notice and received by Purchasing Agent prior to bid opening. After bid opening, no changes in bid prices or

other provisions of bids prejudicial to the interests of the District or fair competition shall be permitted. In lieu of bid correction, a low bidder alleging a material mistake of fact may be permitted to withdraw its bid if:

- (1) The mistake is clearly evident on the face of the bid document; or
- (2) The bidder submits evidence which clearly and convincingly demonstrates that a mistake was made.

Any decision to permit correction before withdrawal of bid or to cancellation of awards or contracts based on bid mistakes shall be supported by a written determination made by the Purchasing Agent including the grounds upon which the determination was made.

- (h) *Negotiations.* If the low responsive and responsible bid for a construction project exceeds available funds as certified by the Finance Manager and such bid does not exceed such funds by more than ten percent (10%), the Purchasing Agent is authorized, when time or economic considerations preclude resolicitation of work of a reduced scope, to negotiate an adjustment of the bid price with the low responsive and responsible bidder in order to bring the bid within the amount of available funds..
 - (1) Should negotiation fail to reduce the cost, the Purchasing Agent may then negotiate with the next lowest bidder;
 - (2) Should negotiation again fail bidder to reduce the cost, the Purchasing Agent may then negotiate with the next lowest or cancel the bid.
- (i) *Award.* The contract shall be awarded with reasonable promptness by appropriate written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the IFB. An award may be made on an all-or-nothing or multiple source basis, consistent with Section 19 (b), whichever is the most advantageous to the District .
- (j) *Multistep sealed bidding.* When it is considered impractical to prepare initially a purchase description to support an award based on price, an IFB may be issued requesting the submission of unpriced offers, which may include a separate sealed price proposal, or may be followed by an IFB limited to those bidders whose offers have been determined to be technically acceptable under the criteria set forth in the first solicitation.
- (k) *Identical bids.* When competitive sealed bids are used and two or more of the bids submitted are identical in price and are the low bid, the Purchasing Agent may:
 - (1) Award pursuant to the multiple source award provision of section 19 (b);
 - (2) Award by lottery or game of chance of the Purchasing Agent's choosing to one of the identical low bidders; or
 - (3) Reject all bids and re-solicit bids for the required goods, services, or construction.

Competitive sealed Requests for Proposals (RFPs) and Qualifications (RFQs).

The Purchasing Agent shall be responsible for developing procedures for processing, recording and securing all documents for RFPs and RFQs. Confidential information shall be identified as such by the proposer, and subject to state laws regarding its handling. The user department director shall appoint the bid evaluation committee and committee chairperson.

10. Conditions for Use of RFP. When the Purchasing Agent determines that, based on written justification provided by the user department, the use of competitive sealed bidding is either not practical or not advantageous in seeking the best value to the District, a contract may be entered into by use of RFPs.

- (1) Issuing the RFP. Proposals shall be solicited through an RFP which shall be issued and shall include the specifications for the goods, services or construction, a sample copy of the proposed contract terms applicable to the procurement unless waived by the Purchasing Agent, additional requirements specific to a particular procurement as may be in the best interest of the District, the location where proposals are to be received and the date, time and place where proposals are to be received.
- (2) Multistep RFPs. When, because of the unique set of qualifications needed the Purchasing Agent considers it impractical to prepare initially a solicitation which includes price, an RFP may be issued requesting the submission of Statement of Qualifications (SOQs) which include a separate sealed price proposal, or may be followed by an RFP limited to those offerors whose offers have been determined by the evaluation committee to be qualified under the criteria set forth in the first solicitation.
- (3) Public notice. Adequate public notice of the RFP shall be given in the same manner as provided in Section 9 (c).
- (4) Offerors list. The Purchasing Agent shall send copies of each RFP to at least those persons that have formally requested from the purchasing office the documents for submitting a proposal. Registration fees or deposits may be required as provided in section 9 (d).
- (5) Receipt of proposals. Proposals shall be handled so as to prevent disclosure of the identity of any offeror or the contents of any proposal to competing offerors during the process of negotiation. A register of proposals shall be prepared containing the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the item offered. The register of proposals shall be open for public inspection only after contract award.
- (6) Evaluation factors. The RFP shall state the relative weight of price and other evaluation factors.
- (7) Evaluation of the RFP. Interviews are only for the purpose of clarification, and may be used for adjusting the initial score. The final evaluation results shall be forwarded to the Purchasing Agent.

(8) Discussion with responsible offerors and revisions to proposals. As provided in the RFP, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably likely to be selected for award for the purpose of clarification to ensure full understanding and conformation with the solicitation requirements for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by finalist offerors.

(9) Award shall be made to the responsible offeror whose proposal is determined in writing by the evaluating committee to be the most advantageous to the District, taking into consideration the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the written basis on which the award is made.

11. Conditions for use of RFQs. When the Purchasing Agent determines in writing, based on written justification provided by the user department that the use of an IFB or RFP is either not practical or not advantageous to the District in soliciting professional services, a contract may be entered into by use of competitive sealed RFQs. The Purchasing Agent shall publicly issue an RFQ for professional service providers to submit a Statement of Qualifications and to negotiate such contracts on the basis of demonstrated competence and qualifications and performance date.

(1) Issuing and processing the RFQ. The RFQ will be handled in the same manner as in subsections (1) through (7) of Section 10(a) above except for a price proposal, which is not used.

(2) Selection process. The evaluation committee shall select, ranked in the order of their qualifications, the person(s) deemed to be the most highly qualified to perform the required services, after considering the following criteria:

- a. Specialized design or technical competence of the person regarding the type of services required;
- b. Capacity and capability of the person, including any consultants, their representatives, qualifications, and locations, to perform the work, within the time limitations;
- c. Past record of performance on contract with government agencies or private industry with respect to such factors as control of costs, quality of work and ability to meet schedules; and/or
- d. Any other criteria as deemed necessary.

(3) Negotiation. Upon selection of the finalist(s), the Purchasing Agent or designee shall negotiate a contract with the person considered to be the most qualified for the required services at compensation which the Purchasing Agent or designee determines in writing to be fair and reasonable to the District. In making this decision, the Purchasing Agent or designee shall take into account the estimated value, the scope, the complexity and the professional nature of the services to be rendered. Should the Purchasing Agent or designee be unable to negotiate a contract at a fair and reasonable price with the selected person, the valuation committee shall select additional persons in order of their competence and qualifications, and

the Purchasing Agent or designee shall continue negotiations with the additional persons in the order of their competence and qualifications in accordance with this section until an agreement is reached.

12. Small purchases.

- A. *Generally.* Any purchase may be made in accordance with the small purchase procedures authorized in this Section. A purchase shall not be artificially divided so as to constitute a small purchase under this Section. Professional services not exceeding \$50,000.00 may be but are not required to be conducted by competitive written proposal.
- B. *Any purchases not exceeding \$10,000.00, exclusive of applicable gross receipts tax.* The Purchasing Agent shall adopt operational procedures for making small purchases not exceeding \$10,000.00. Such operational procedures shall provide for obtaining adequate and reasonable competition for the goods, services or construction being purchased, properly account for the funds expended and facilitate an audit of the small purchases made.
- C. *Purchases from \$10,000.01 to \$35,000.00, exclusive of applicable gross receipts tax.* Insofar as it is practical, the purchaser shall solicit no less than three quotations. Award shall be made to the person offering the lowest acceptable quotation. The names of the persons from which quotations were solicited, and the date and the amount of each quotation, shall be recorded and maintained in accordance with established District records retention standards.
- D. *Procurement of professional services not exceeding \$50,000.00, exclusive of applicable gross receipts tax.* Professional services having a value not exceeding \$50,000.00 may be procured without competitive sealed bids or proposals. For Professional Services the department may determine available sources and negotiate directly with the prospective vendors. Competitive informal proposals or quotes are recommended in order to obtain the services in the best interest of the District, but are not required.

13. Sole source procurement.

A contract may be awarded without competition when the Purchasing Agent determines in writing, after conducting a good faith review of available sources, that there is only one source for the required goods, service or construction item in the USA. A sole source selection may also result when there is only one respondent to an RFI as in Section 33(c)(2). The Purchasing Agent or designee shall conduct negotiations, as appropriate, as to price, delivery and terms. A record of these procurements shall be maintained as a public record and shall list each contractor's name, the amount and type of each contract, a listing of the items procured under each contract, a letter or memo of justification documenting the reason for the selection of the source, and the identification number of each contract file.

14. Emergency procurements.

The Purchasing Agent may make or authorize others to make emergency procurements of goods, services or construction items when there exists a threat to public health, welfare or safety, provided that such emergency procurements shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. As soon as practicable, a record of each emergency procurement shall be made and shall set forth the contractor's name, the amount and type of

the contract, a listing of the items procured under the contract and the identification number of the contract file.

15. Cancellation of solicitations.

An IFB, an RFP or other solicitation may be canceled, or any or all bids or proposals may be rejected when it is in the best interests of the District. The reasons therefore shall be made part of the file. Each solicitation issued by the District shall state that the solicitation may be canceled and that any bid or proposal may be rejected in whole or in part when in the best interest of the District. Notice of cancellation shall be sent to all respondents. The notice shall identify the solicitation, explain the reason for cancellation and, where appropriate, explain that an opportunity will be given to compete on any resolicitation or any future procurements of similar items. Reasons for rejection shall be provided upon request by unsuccessful bidders or offerors.

16. Responsibility of bidders and offerors.

Determination of non-responsibility. If a bidder or offeror is found to be non-responsible, the Purchasing Agent shall prepare a written determination of nonresponsibility setting forth the basis of the finding. The unreasonable failure of a bidder or offeror to supply information promptly in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such bidder or offeror. The final determination shall be made part of the contract file and be made public record.

17. Cost or pricing data.

- (a) *Required submissions relating to the award of contracts.* A prospective contractor shall submit cost or pricing data when the contract is expected to exceed \$500,000.00 and is to be awarded by competitive sealed proposals (Section 10) or by sole source procurement (Section 12). The submission of cost or pricing data relating to the award of a contract is not required when:
- (1) The contract price is based on competitive bid;
 - (2) The contract price is based on established catalog prices or market prices;
 - (3) The contract price is set by law or regulations;
 - (4) The contract is for professional services;
 - (5) The contract is awarded pursuant to the Public Building Energy Efficiency Act;
 - (6) The Purchasing Agent determines in writing that the requirements of this Section may be waived, and the determination states the reasons for such waiver.
- (b) *Required submissions relating to change orders or contract modifications.* A contractor shall submit cost or pricing data prior to the pricing of any change order or contract modification, including adjustment to contracts awarded by competitive sealed bidding, whether or not cost or pricing data was required in connection with the initial pricing of the contract, when the change or modification involves aggregate increases or aggregate decreases in cost, plus applicable profits, that are expected to exceed ten percent (10%) of

original contract price. The submission of cost or pricing data relating to the pricing of a change order or contract modification is not required when:

- (1) An unrelated and separately priced adjustment for which cost or pricing data would not be required are consolidated for administrative convenience; or
 - (2) The Purchasing Agent determines in writing that the requirements of this Section may be waived, and the determination states the reasons for such waiver.
- (c) *Certification requirements.* A contractor, actual or prospective, required to submit cost or pricing data in accordance with this Section, shall certify that, to the best of his or her knowledge and belief, the cost or pricing data submitted was accurate, complete and current as of a mutually specified date prior to the award of the contract or the pricing of the change order or contract modification.
- (d) *Price adjustment provision required.* Any contract award, change order or contract modification under which the submission and certification of cost or pricing data are required shall contain a provision stating that the price to the District, including profit or fee, shall be adjusted to exclude any significant sums by which the District finds that such price was increased because the contractor-furnished cost or pricing data was inaccurate, incomplete or not current as of the date agreed upon between the District and the contractor.

18. Cost or price analysis.

- (a) A cost analysis or price analysis, as appropriate, shall be conducted by the evaluation committee or Project Manager prior to award of the contract when required under section 16. A written record of such analysis shall be made part of the contract file.
- (b) Cost analysis includes the appropriate verification of cost or pricing data, and the use of this data, as well as any available historical comparative data, to evaluate:
- (1) Specific elements of costs;
 - (2) The necessity of certain costs;
 - (3) The reasonableness of amounts estimated for the necessary cost;
 - (4) The reasonableness of allowances for contingencies;
 - (5) The basis used for allocation of indirect costs;
 - (6) The appropriateness of particular indirect costs to the proposed contract;
and
 - (7) The reasonableness of the total cost or price.
- (c) Price analysis shall be made upon the following criteria for the same or similar items or services:
- (1) Price submissions of prospective bidders or offerors in the current procurement;

- (2) Prior price quotations and contract prices charged by the bidder, offeror or contractor;
- (3) Prices published in catalogues or price list;
- (4) Prices available on the open market; or
- (5) In-house estimates of cost.

19. Bid and performance bonds on goods or service contracts.

Bid and performance bonds or other security may be requested for goods and/or service contracts as the Purchasing Agent or department manager deems advisable to protect the District's interests. Any such bonding requirements shall be set forth in the solicitation. Bid or performance bonds shall not be used as a substitute for determination of a bidder's or offeror's responsibility.

20. Types of contracts.

General authority. Subject to the limitations of this Section, any type of contract which is appropriate to the procurement and which will promote the best interests of the District will be used, provided that the use of a cost-plus-a-percentage-of-cost contract is prohibited. A cost reimbursement contract may be used only when a determination is made by the Purchasing Agent that such a contract is likely to be less costly to the District than any other type or that it is impracticable to obtain the goods, service or construction item required except under such a contract.

(a) *Multi-term contracts.*

- (1) Specified period. A contract can be for multiple fiscal periods, as needed. Unless otherwise provided by law, a contract for goods or services may be entered into for any period up to four years, subject to the following provisions:
 - a. that the term of the contract and conditions of renewal or extension, if any, are included in the solicitation;
 - b. renewals or extensions may be for up to three consecutive one-year periods;
 - c. funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds thereof;
 - d. a multi-term contract that exceeds the Executive Director's purchasing authority as provided in Section 8 of these regulations over the cumulative time period of a multi-year contract shall be brought to the District Board for approval;
 - e. construction contracts are exempt from the limit.
- (2) Determination prior to use. Prior to the utilization of a multi-term contract, the Purchasing Agent shall determine that:

- a. Estimated requirements cover the period of the contract and are reasonably firm and continuing; and
 - b. Such a contract will serve the best interests of the District by encouraging effective competition or otherwise promoting economies in District procurement.
 - (3) Cancellation due to unavailability of funds in succeeding fiscal periods. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be canceled and the contractor shall be reimbursed for the reasonable value of any nonrecurring cost incurred but not amortized in the price of the goods or services delivered under the contract. Such cost of cancellation may be paid only from any appropriations available for such purposes.
- (b) *Multiple source contracting.*
- (1) Generally. A multiple source award is an award of a contract for one or more similar goods or services to more than one bidder or offeror. The obligation to order the District's actual requirements is limited by the provision of the Uniform Commercial Code, NMSA 1978, § 55-1-101 et seq.
 - (2) Limitations on use. A multiple source award may be made when an award to two or more bidders or offerors for similar products is necessary for adequate delivery, service or product compatibility. Any multiple source awards shall be made in accordance with the provisions of Sections 9 through -11, and 13, as applicable. Multiple source awards shall not be made when a single award will meet the District's needs without sacrifice of economy or service. Awards shall not be made for the purpose of dividing business, making available product or supplier selection to allow for user preference unrelated to utility or economy, or avoiding the resolution of the bids. Any such awards shall be limited to the least number of suppliers necessary to meet valid requirements.
 - (3) Contract and solicitation provisions. All eligible users of the contract shall be named in the solicitation, and it shall be mandatory that the actual requirements of such users that can be met under the contract be obtained in accordance with the contract; provided, however, that:
 - a. The District shall reserve the right to take bids separately if a particular quantity requirement arises which exceeds its normal requirement or an amount specified in the contract; or
 - b. The District shall reserve the right to take bids separately if the Purchasing Agent approves a finding that the goods or service available under the contract will not meet a special need of the District.
 - (4) Intent to use. The District shall, in the solicitation document, reserve the right to make such an award.
 - (5) Determination required. The Purchasing Agent shall make a written determination setting forth the reasons for a multiple source award, which shall be made a part of the procurement file.

(c) *Price agreements.*

- (1) Generally. A price agreement is an award of an Indefinite Delivery/Indefinite Quantity contract for one or more similar goods or services to one or more bidder(s) or offeror(s). It is used for anticipated numerous or recurring purchases at a predetermined price or pricing structure over an extended time period. Task orders, once initiated within the contract term, will continue until the completion of the specific task without regard to term of the basic contract unless otherwise stipulated. Since a Price Agreement does not have specific delivery of goods or services required at inception, individual task orders or purchases shall be approved by the appropriate person in accordance with the approval levels in Section 8.
 - a. Limitations on Use. A price agreement may be awarded subject to the provisions in sections 9 through -12 and 19 (b).
 - b. Intent to use. The District shall, in the solicitation document, reserve the right to make such an award.

(d) *Administrative Grouping of Requirements for Inventory*

- (1) Generally. Administrative grouping of requirements for inventory recognizes that inventory replenishments or purchases are actually an aggregate of multiple discreet requirements. With this administrative grouping, each purchase order line stands on its own with respect to approval levels in section 8.
- (2) Limitations on use. This method only pertains to items of inventory.

21. Contract clauses and administration.

- (a) *Contract clauses.* All the District contracts for goods, service or construction shall include provisions necessary to define the responsibilities and rights of the parties to the contract. The Purchasing Agent, after consultation with the District Legal Counsel, may issue clauses appropriate for goods, service or construction contracts, addressing among others the following subjects:
- (1) The unilateral right of the District to order, in writing, changes in the work within the scope of the contract;
 - (2) The unilateral right of the District to order, in writing, temporary stoppage of the work or delaying performance that does not alter the scope of the contract;
 - (3) Variations occurring between estimated quantities or work in contract and actual quantities;
 - (4) Defective pricing;
 - (5) Liquidated damages;
 - (6) Specified excuses for delay or nonperformance;

- (7) Termination of the contract for default;
 - (8) Termination of the contract in whole or in part for the convenience of the District ;
 - (9) Suspension of work on a construction project ordered by the District ;
 - (10) Site conditions differing from those indicated in the contract or ordinarily encountered, except that a differing site conditions clause need not be included in a contract when:
 - a. The contract is negotiated;
 - b. The contractor provides the site or design; or
 - c. The parties have otherwise agreed with respect to the risk of differing site conditions.
 - d. Insurance.
- (b) *Price adjustments.* Adjustments in price resulting from the use of contract clauses by Subsection (a) of this section shall be computed in one or more of the following ways:
- (1) By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
 - (2) By unit prices specified in the contract or subsequently agreed upon;
 - (3) By the costs attributable to the events or situations under such clauses with adjustments of profit or fee, all as specified in the contracts or subsequently agreed upon;
 - (4) In such other manner as the contracting parties may mutually agree upon;
 - (5) In the absence of agreement by the parties, a unilateral determination by the District of the costs attributable to the events or situations under such clauses with adjustment of profit or fee as computed by the District , as accounted for in accordance with generally accepted cost accounting principles and subject to the provisions of Article VII of this Chapter.
 - (6) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of section 16.
- (c) *Standard clauses and their modification.* The Purchasing Agent, after consultation with the District's Legal Counsel, may establish standard contract clauses for use in the District contracts. If the Purchasing Agent establishes any standard clauses addressing the subjects set forth in Subsection (a) of this section, such clauses may be varied, provided that any variations are supported by a written determination stating the circumstances justifying such variations.

- (d) *Advance payment clause permitted.* Advance payment may be permitted when, in consultation with the District's Legal Counsel, the Purchasing Agent authorizes a contract under Section 3 (b)4 Procurement of goods, services, or construction items under existing contract, and such prior contract relied upon contains an advance payment clause.

22. Cooperative procurement authorized.

The District may join, participate in, sponsor, or administer a cooperative procurement agreement for the procurement of goods, services or construction with any other federal agency, state agency, tribal entities or other public entity.

23. Cost reimbursement provisions.

Cost reimbursement contracts funded by federal agencies shall satisfy the requirements of 41 CFR 1-15.

24. Right to inspect plant.

The District may, at reasonable times, inspect the part of the plant, place of business or worksite of a contractor or subcontractor at any tier which is pertinent to the performance of any contract awarded or to be awarded by the District.

25. Right to audit records.

- (a) *Audit of cost or pricing data.* The District may, at reasonable times and places, with written notice, audit the records of any contractor who has submitted cost or pricing data pursuant to Section 16, to the extent that such records are pertinent to such cost or pricing data. Any person who receives a contract, change order, or contract modification for which cost or pricing data is required shall maintain such records that are pertinent to such cost or pricing data for six years from the date of final payment under the contract.
- (b) *Contract audit.* The District shall be entitled to audit the records of a contractor or a subcontractor at any tier under negotiated contract or subcontract to the extent that such records are pertinent to the performance of such contract or subcontract. Such records shall be maintained by the contractor and subcontractor(s) for a period of six years from the date of final payment under the prime contract.

26. Reporting of anticompetitive practices.

When for any reason collusion or other anticompetitive practices are suspected among any bidders or offerors, a notice of the relevant facts shall be transmitted to the District's Legal Counsel for forwarding to the state attorney general.

27. District procurement records.

- (a) *Public access to procurement information.* Procurement information shall be public record to the extent provided in the Inspection of Public Records Act.
- (b) *Contract file.* All determinations and other written records pertaining to the solicitation, award or performance of a contract shall be maintained for the District in a contract file by the Purchasing Agent. The documents attached to this policy are illustrative only and are subject to modification and change at the discretion of the Purchasing Agent.
- (c) *Retention of procurement records.* All procurement records shall be recorded and maintained in accordance with established District records retention standards. All federal contracts shall be maintained for three years after the closeout date of the contract.

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ARTICLE IV. SPECIFICATIONS

28. Maximum practicable competition.

All specifications shall be drafted so as to promote overall economy for the purposes intended and encourage competition in satisfying the District's needs, and shall not be unduly restrictive. The policy enunciated in this Section applies to all specifications including, but not limited to, those prepared for the District by architects, engineers, designers and draftsmen.

29. Qualified products list.

The Purchasing Agent may develop a qualified products list, in accordance with Article V of this Chapter. Should any product be available only from a sole source, the using department and purchasing office must review specifications at least annually and make a written determination as to the sole source status. The qualified products list status shall in no way be used to limit competition.

30. Brand name or equal specifications.

- (a) *Use.* Brand name or equal specifications may be used when the Purchasing Agent determines in writing that:
 - (1) No other design or performance specification or qualified products list is available;
 - (2) Time does not permit the preparation of another form or purchase description not including a brand name specification;
 - (3) The nature of the product or the nature of the District's requirements makes use of a brand name or equal specification suitable for the procurement; or
 - (4) Use of a brand name or equal specifications is in the District's best interests.
- (b) *Designation of several brand names.* Brand name or equal specifications shall seek to designate brands as are practicable as "or equal" references and shall further state that substantially equivalent products to those designated will be considered for award.
- (c) *Required characteristics.* Unless the Purchasing Agent determines that the essential characteristics of the brand names included in the specifications are commonly known in the industry or trade, brand name or equal specification shall include a description of the particular design, functional or performance characteristics which are required.
- (d) *Nonrestrictive use of brand name or equal specifications.* Where a brand name or equal specification is used in a solicitation, the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard quality, performance and characteristics desired and is not intended to limit or restrict competition.
- (e) *Exemption.* Small purchases described in Section 11(b) are exempt from this provision.

31. Brand name specification.

- (a) *Use.* Since use of a brand name specification is restrictive of product competition, it may be used only when the purchaser has justified and the Purchasing Agent makes a written determination that only the identified brand name item will satisfy the District's needs.
- (b) *Competition.* The Purchasing Agent shall seek to identify sources from which the designated brand name item can be obtained and shall solicit such sources to achieve whatever degree of price competition is practicable. If only one source can supply the requirement, the procurement shall be made under Section 12.
- (c) *Exemption.* Small purchases described in Section 11(b) are exempt from this provision.

32. Item Life-cycle specifications.

The District may use item life-cycle specifications in evaluating bids if such method is required in the IFB. Life-cycle specifications shall use criteria to take into consideration the initial purchase price, life, output, maintenance or consumption, disposal value, complexity of operation, required training and other factors contributing to the overall cost of an item.

33. Total cost specifications.

The District may use total cost specifications in evaluating bids if such method is required in the IFB. Total cost specifications criteria is the same as life-cycle specifications, except the disposal value has been predetermined and is included in the contract as an option. This option is to trade in at this predetermined fixed price, or sell at the District's option.

34. Complex specifications.

In the event a department develops a need for goods, service or construction with a complex set of specifications or scope of work and the department desires assistance to develop them, the department shall request in writing that the Purchasing Agent issue a Request for Information (RFI).

- (a) The user department shall provide as much information as feasible to the Purchasing Agent for development of the RFI;
- (b) The Purchasing Agent shall prepare the RFI and process it as in Section 10;
- (c) Upon receipt of the Information:
 - (1) If from multiple sources, the user department shall make a good faith effort to combine the various inputs into a coherent whole; or
 - (2) If from only one source, the department may use the document as the basis for a sole source justification.
 - (3) The information assembled in Subsection (c) (1) above shall be used as the basis for an IFB or RFP.

ARTICLE V. PROCUREMENT OF CONSTRUCTION MANAGEMENT AND CONSTRUCTION SERVICES

35. Selection of construction management. The Project Manager shall have discretion to:

- (a) select the appropriate method of construction management for a particular project. In determining which method to use, the Project Manager shall consider the District's requirements, its resources, and the potential contractor's capabilities;
- (b) select which method of solicitation for construction management applies for a particular project, either as a single-step or multi-step RFP as in Section 10~~(a)~~, or as an RFQ in Section ~~II+0(b)~~ Article III.

36. Bid security.

- (a) *Requirement.* Bid security shall be required for all competitive sealed bidding for construction contracts when the price is estimated by the using agency to exceed \$50,000.00. Bid security shall be a bond provided by a surety company authorized to do business in the state, or the equivalent in cash, or otherwise supplied in a form ~~satisfactory to~~ satisfactory to the District. Such bonds on construction contracts under \$50,000.00 may be required by the Purchasing Agent when the circumstances warrant.
- (b) *Amount.* Bid security shall be in an amount equal to at least five percent (5%) of the total amount of the bid including all options.
- (c) *Rejection of bids for noncompliance with bid security requirements.* When the IFB requires security, noncompliance requires that the bid be rejected unless it is determined the bid fails to comply only in a non-substantial manner with the security requirements.
- (d) *Withdrawal of bids.* If a bidder is permitted to withdraw its bid before award as provided in Article III Section 9 (g) no action shall be taken against the bidder or the bid security.

37. Contract performance and payment bonds.

- (a) *When required; amounts.* When a construction contract is awarded in excess of \$50,000.00, the following bonds or security shall be delivered to the District and shall become binding on the parties upon the execution of the contract:
 - (1) A performance bond satisfactory to the District, executed by a surety company authorized to do business in the state or otherwise secured in a manner satisfactory to the District, in an amount equal to one hundred percent (100%) of the price specified in the contract; and
 - (2) A payment bond satisfactory to the District, executed by a surety company authorized to do business in the state or otherwise secured in a manner satisfactory to the District, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract. The bond shall be in an amount equal to 100% of the price specified in the contract.

- (b) *Authority to require additional bonds.* The District retains the authority to require a performance bond or other security in addition to those bonds, or in circumstances other than specified in Subsection (a) of this section.
- (c) *Suits on payment bonds; right to institute.* Unless otherwise authorized by law, any person who has furnished labor or material to the contractor or subcontractors, whether in an expressed or implied contract, for the work provided in the contract, for which a payment bond is furnished under this Section, and who has not been paid in full within 90 days from the date on which that person last performed the labor or supplied the material, shall have the right to sue on the payment bond for any amount unpaid at the time the suit is instituted upon giving written notice to the contractor within 90 days from the date on which that person last performed the labor or supplied the material. That person shall state in the notice the amount claimed and the name of the party to whom the material was supplied or for whom the labor was performed. The notice shall be served personally or by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts business.
- (d) *Suits on payment bonds; where and when brought.* Unless otherwise authorized by law, every suit instituted upon a payment bond shall be brought in a court of competent jurisdiction within the District's boundaries.

38. Copies of bond forms.

Any person may request and obtain from the District a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the contents, execution and delivery of the original.

39. Architect-engineer and land surveying services.

- (a) *Source selection.* The Purchasing Agent shall publicly issue either a multi-step RFP as in section 10(a) or an RFQ as in section 10(b) of Article III for the procurement of architect-engineer and land surveying services.
- (b) *Selection process.* An evaluation committee will be appointed by the Executive Director or his designee for general District departments, requiring architect-engineer or land survey services. The committee shall select, ranked in the order of their qualifications, those firms submitting SOQs deemed to be the most highly qualified to perform the required services, after considering the following criteria:
 - (1) Specialized design and technical competence of the business regarding the type of services required;
 - (2) Capacity and capability of the person, including any consultants, their representatives, qualifications, and locations, to perform the work, including any specialized services, within the time limitations;
 - (3) Past record of performance on contract with government agencies or private industry with respect to such factors as control of costs, quality of work and ability to meet schedules;

- (4) Proximity to or familiarity with the area in which the project is located;
and
 - (5) Price may be considered in connection with construction management contracts.
- (c) *Negotiation.* The Purchasing Agent or designee shall negotiate a contract with the firm considered to be the most qualified for architect-engineer or land surveying services at compensation which the Purchasing Agent or designee determines in writing to be fair and reasonable to the District . In making this decision, the Purchasing Agent or designee shall take into account the estimated value, the scope, the complexity and the professional nature of the services to be rendered. Should the Purchasing Agent or designee be unable to negotiate a contract at a fair and reasonable price with the selected firm, the selection committee shall select additional firms in order of their competence and qualifications, and the Purchasing Agent or designee shall continue negotiations with the additional firms in the order of their competence and qualifications in accordance with this section until an agreement is reached.

40. Construction projects.

- (a) Except as provided in section 40, a person selected to perform architect-engineer or land surveying services shall not be eligible for consideration for construction projects that result from the person's design or engineering services obtained separately from construction services.
- (b) The successful person is not precluded from providing project management or construction management services for the design or engineering services which it has provided.

41. Design-build projects.

- (a) A design-build project delivery system may be authorized when the Purchasing Agent makes a determination in writing that it is appropriate and in the best interest of the District to use the system on a specific project. The project may be construed to mean the initial desired outcome including any specific site for construction or alternate site that may be identified after a contract has been awarded. The determination shall be issued only after the Purchasing Agent has taken into consideration the following criteria, which shall be used as the minimum basis in determining when to use the design-build process:
 - (1) The extent to which the project requirements and possible options have been, or can be, adequately defined;
 - (2) Time constraints for delivery of the project;
 - (3) The capability and experience of potential teams with the design-build process;
 - (4) The suitability of the project for use of the design-build process as concerns special expertise, time, schedule, costs and/or quality; and

- (5) The capability of the District to manage the project, including experienced personnel or outside consultants, and to oversee the project with persons who are familiar with the design-build process.
- (b) When a determination has been made by the Purchasing Agent that it is appropriate to use a design-build project delivery system, the design-build team shall include, as needed, a state licensed engineer or architect, and a contractor properly licensed in New Mexico for the type of work required.
- (c) For each proposed design-build project, a two-phase procedure for awarding design-build contracts shall be adopted and shall include at a minimum the following:
 - (1) During phase one, an RFQ shall be prepared for an engineer or architect teamed with a New Mexico licensed contractor in accordance with section 38 and shall include minimum qualifications, a scope of work statement and schedule, documents defining the project requirements, and a description of the phase two requirements and subsequent management needed to bring the project to completion. The qualifications of responding persons shall be evaluated and a maximum of five firms shall be short listed in accordance with technical and qualifications-based criteria; and
 - (2) During phase two, the short-listed persons shall be invited to submit proposals which include a "rough order of magnitude estimate", concepts or solutions, and scheduling. Unsuccessful short-listed persons may be paid a stipend as described in a particular RFP. After evaluations of these submissions, selection may be made and a contract awarded to the highest ranked team for the design and construction of the project upon the site identified in the solicitation or such other site as may be identified by District after award of the contract.
 - (3) The requesting department will establish design-build specifications and requirements for each project that will strive for the delivery of a quality project on time and within budget.

ARTICLE VI. SUSPENSION OR DEBARMENT

42. Authority to suspend or debar.

- (a) *Suspension.* After consultation with the District's Legal Counsel, the Purchasing Agent is authorized to suspend a person from consideration for award of contracts if there is probable cause to believe that the person has engaged in any activity which might lead to debarment. The suspension shall be for a period not to exceed three months.
- (b) *Debarment.* After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Purchasing Agent, after consulting with the District's Legal Counsel, and notice to the Executive Director, is authorized to debar for cause a person from consideration for award of contracts. The debarment shall be for a period of not more than three years. The causes for debarment include the following:
 - (1) Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or the performance or such contract or subcontract;
 - (2) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty which currently, seriously and directly affects responsibility as a District contractor;
 - (3) Conviction under state or federal antitrust statutes arising out of submission of bids or proposals;
 - (4) Violation of contract provisions within the past three years, as set forth below, of a character which is regarded by the Purchasing Agent to be so serious as to justify debarment action:
 - a. Deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
 - b. A recent record of preventable failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts.
 - (5) Any other cause the Purchasing Agent determines to be so serious and compelling as to affect responsibility as a District contractor, including debarment by another governmental entity for any cause listed in this Article; and
 - (6) For violation of the ethical standards set forth in Article IX of this Chapter.
 - (7) Failure to disclose any of (1) through (6) above in a solicitation as may be requested.

43. Decision to suspend or debar.

The Purchasing Agent shall issue a written decision to suspend or debar. The decision shall state the reasons for the action taken and inform the suspended or debarred person involved of his/her rights concerning judicial or administrative review.

44. Notice of decision.

A copy of the decision required by Section 42 shall be mailed, postage pre-paid certified mail return receipt requested or otherwise furnished immediately to the suspended or debarred person.

45. Finality of decision.

A decision under Section 42 shall be final and conclusive unless the suspended or debarred person within 15 calendar days after receipt of decision takes an appeal to the District Board.

46. Appeal.

Any appeal to the District Board of an adverse decision shall be made by filing a notice of appeal with the Executive Director's office within 15 calendar days after the decision has been delivered to the aggrieved person. The proceeding before the District Board shall be de novo. The decision by the District Board under this subsection shall be final. The District Board's decision may be appealed pursuant to Section 39-3.1.1 and NMRA 1-074 to a court of competent jurisdiction within the District's boundaries.

ARTICLE VII. PROTESTS, APPEALS AND REMEDIES

47. Authority to resolve protested solicitations and awards.

The Purchasing Agent is responsible to address, process, and exercise the following:

- (a) *Protests of bid or RFP specifications or scope of work.* Any vendor who is aggrieved in connection with the specifications or scope of work in a solicitation may protest to the Purchasing Agent. The protest shall be submitted in writing no later than 7 calendar days prior to the deadline for receipt of the bid or proposal. No protest bond will apply to such protest. The Purchasing Agent shall issue a determination in writing within 2 work days of receipt of such protest, and either proceed with the solicitation, modify it, or cancel it
- (b) *Right to protest; protest bond.* Any actual or prospective bidder, offeror or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the Purchasing Agent. The protest shall contain all the grounds for such protest, and must be submitted in writing within 15 calendar days after such aggrieved person knows or should have known of the facts giving rise thereto, along with a bond provided by a surety company authorized to do business in the state, or the equivalent in cash, or otherwise supplied in a form satisfactory to the District. The amount of the bond shall not exceed the estimated cost to the District of processing and defending a protest. Only one protest per person per solicitation is permitted.
- (c) *Authority to resolve protests.* The Purchasing Agent shall have the authority, prior to the commencement of an action in court concerning the controversy, to settle and resolve a protest of an aggrieved bidder, offeror or contractor, actual or prospective, concerning the solicitation or award of a contract.
- (d) *Decision.* If the protest is not resolved by mutual agreement, the Purchasing Agent shall promptly issue a decision in writing stating the reason for the action taken and informing the protestant of its right to appeal the decision to the District Board. A copy of the decision of the Purchasing Agent shall be mailed, return receipt requested, or hand-delivered to the protestant or to the address provided in the protest.
- (e) *Appeal.* Any appeal to the District Board of an adverse decision shall be made by filing with the Executive Director's office within 15 calendar days after the decision has been delivered to the aggrieved person. The proceeding before the Board shall be de novo. The Board shall decide whether the solicitation or award was in accordance with this Policy, procedures, and the terms and conditions of the solicitation.
- (f) *Decisions final.* A decision of the District Board under this Section shall be final and conclusive. The aggrieved person may seek judicial review in the state First Judicial District Court within 30 days of the receipt of notice of the decision of the District Board.
- (g) *Stay of procurements during protests.* In the event of a timely protest under subsection (a) of this section, the Purchasing Agent shall not proceed further with the solicitation or with the award of the contract unless the Purchasing Agent, after consultation with the Executive Director, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the District.
- (h) *Entitlement to costs.*

- (1) When a protest is sustained and the protesting bidder or offeror should have been awarded the contract under the solicitation but was not, then the protesting bidder or offeror shall be entitled, in addition to any other relief, to the reasonable costs incurred in connection with the protest or appeal costs other than attorney's fees.
- (2) Should the protest be denied, the District shall be entitled to recover reasonable costs for processing and adjudicating the protest, and for costs associated with an unreasonable delay of the contract. Recovery of these costs shall not be limited to the proceeds from the protest bond. Excess bond proceeds shall be returned to the person.

48. Contract Claims.

Claims include, without limitation, disputes arising under a contract, and those based upon breach of contract, mistake, misrepresentation or other cause for contract modification or rescission. Within 15 calendar days of the time the contractor knows or should have known of the facts and circumstances giving rise to a claim the following procedure shall apply:

- (a) *Notice of claim to the Purchasing Agent.* All claims by a contractor against the District relating to a contract except bid protests shall be submitted in writing to the Purchasing Agent for decision. The contractor may request a conference with the Purchasing Agent on the claim.
- (b) *Notice to the contractor of the Purchasing Agent's decision.* The decision of the Purchasing Agent shall be issued in writing within 15 calendar days of claim notice and immediately mailed, or otherwise furnished, to the contractor. The decision shall state reasons for the decision reached, and shall inform the contractor of its appeal rights under subsection (d) of this section.
- (c) *Failure to render timely decision.* If the Purchasing Agent does not issue a written decision regarding any contract controversy within 15 days after written request for a final decision, or within such longer period as may be agreed upon between the parties, then the aggrieved party may proceed as if an adverse decision had been received.
- (d) *Appeal.* Any appeal to the District Board of an adverse decision shall be made by filing with the Executive Directors office within 15 calendar days after the decision has been received by the aggrieved person. The proceeding before the District Board shall be de novo.
- (e) *Decisions by Board final; exception.* A decision of the District Board under this section shall be final and conclusive unless a protestant seeks judicial review in the state First Judicial District Court within 30 days of the receipt of notice of the decision of the District Board.

49. Remedies for solicitations or awards in violation of law.

- (a) *Prior to bid opening or closing date for receipt of proposals.* If, prior to the bid opening or the closing date for receipt of proposals, the Purchasing Agent, after consultation with the District Attorney, determines that a solicitation is in violation of applicable law or regulation then the solicitation shall be canceled by the Purchasing Agent or revised to comply with applicable law.

- (b) *Prior to award.* If, after bid opening or the closing date for receipt of proposals, the Purchasing Agent, after consultation with the District Legal Counsel, determines that a solicitation or a proposed award of a contract is in violation of applicable law then the solicitation or proposed award shall be canceled by the Purchasing Agent.
- (c) *After award.* If, after an award, the Purchasing Agent, after consultation with the District Legal Counsel, determines that a solicitation or award of a contract was in violation of applicable law, then:

If neither the purchaser nor the person awarded the contract has acted fraudulently or in bad faith:

- a. The contract or invoice may be ratified and affirmed or approved for payment by the Board for any amount or the Executive Director, as applicable, for amounts under \$100,000.00, provided that it is determined that doing so is in the best interests of the District ; or
- b. The contract may be terminated and the person awarded the contract shall be compensated for the actual costs reasonably incurred under the contract, plus a reasonable profit, prior to the termination; or

If either the purchaser or the person awarded the contract has acted fraudulently or in bad faith, the contract may be declared null and void by the Purchasing Agent, if such action is in the best interests of the District.

50. Procurement violations.

Unauthorized Purchases. Any Purchase which is not legally and appropriately approved within the budget or by other NCRTD action, or which does not substantially comply with the provisions of this policy shall be considered an unauthorized purchase, and thereby not subject to payment by the District. The District hereby declares and establishes that it will assume no responsibility for payment of unauthorized purchases. Furthermore, any individual initiating or otherwise executing any unauthorized purchase is solely responsible for payment and may be subject to disciplinary action up to and including dismissal. All authorized purchases shall be legally budgeted or approved within an appropriate fund or agency account, or within an appropriate line item as approved by the Executive Director. All questionable purchases shall be submitted to the Executive Director for review and a determination shall be made by the Executive Director regarding the purchase being an authorized or unauthorized purchase under the provisions of this policy.

ARTICLE VIII. ETHICS IN PUBLIC CONTRACTING

51. Employee conflict of interest.

- (a) Unless waived under Section 54, it shall be unethical and unlawful for any District employee to participate directly or indirectly in any procurement when the District employee knows that:
 - (1) The District employee or any member of the District employee's immediate family has a financial interest pertaining to the procurement; or
 - (2) Any other person with whom the District employee or any member of a District employee's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement contract.
- (b) A District employee or any member of a District employee's immediate family who holds a financial interest in a disclosed blind trust shall not be deemed to have a conflict of interest with regard to matters pertaining to that financial trust.

52. Gratuities and kickbacks.

- (a) It shall be unlawful for any person to offer, give or agree to give any District employee or former District employee, or for any District employee or former District employee to solicit, demand, accept or agree to accept from another person, a gratuity or an offer of employment in connection with:
 - (1) any decision, approval, disapproval, recommendation, or preparation of any part of a program requirement or a purchase requisition;
 - (2) influencing or developing the content or any specifications or procurement standard, except as a result of a published Request for Information;
 - (3) assisting in rendering of advice, investigation, auditing or in any other advisory capacity in proceeding or application, request for ruling, determination, claim or controversy, or other particular matter, pertaining to any program requirement or a contract or subcontract, or to any solicitation or proposal thereof; or
 - (4) accepting any payment, gratuity or offer of employment to be made by or on behalf of a subcontractor or higher tier subcontractor or any person associated therewith as an inducement for the award of a subcontract or order.
- (b) *Contract and solicitation clause.* The prohibition against gratuities and kickbacks prescribed in this section shall be conspicuously set forth in every contract and solicitation.

53. Prohibition against contingent fees.

It shall be unethical and unlawful for a person to be retained, or to retain a person, to solicit or secure a District contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business.

54. Contemporaneous employment.

It shall be unethical and unlawful for any District employee who is participating directly or indirectly in the procurement process to become or to be, while a District employee, the employee of any person contracting with the governmental body by which the employee is employed.

55. Waivers from contemporaneous employment prohibition and other conflicts of interest.

The District Board may grant a waiver from the employee conflict of interest provision (Section 50) or the contemporaneous employment provision (Section 53) upon making a written determination that:

- (1) The contemporaneous employment or financial interest of the District employee has been publicly disclosed prior to solicitation;
- (2) The District employee will be able to perform its procurement functions without actual or apparent bias or favoritism; and
- (3) The award will be in the best interests of the District.

56. Use of confidential information.

It shall be unethical and unlawful for any employee or former employee knowingly to use confidential information for actual or anticipated personal gain, or for the actual or anticipated personal gain of any other person.

57. Sanctions.

In addition to any civil or criminal penalties or fines imposed by federal or state law, the following shall apply:

- (a) *Employees.* The Executive Director may impose any one or more of the following sanctions on a District employee for violation of the ethical standards set forth in this division:
 - (1) Oral or written warning or reprimands;
 - (2) with or without pay for specified periods of time; or
 - (3) Termination of employment.
- (b) *Other Persons.* The Purchasing Agent may impose any one or more of the following sanctions on a person for violations of the ethical standards:
 - (1) Written warnings or reprimands;
 - (2) Termination of contracts; or
 - (3) Suspension or debarment as provided in Section 41.

58. Recovery of value transferred or received in violation of the Code.

- (a) *Generally.* The District may use any and all legal and equitable remedies to recover the value of anything transferred or received in breach of the ethical standards of this Policy by a District employee or other person.
- (b) *Recovery of kickbacks by the District.* Upon a showing that a subcontractor made a kickback to a prime contractor or a higher tier subcontractor in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the amount was included in the price of the subcontract or order and ultimately borne by the District and will be recoverable hereunder from the recipient. In addition, that amount may also be recovered from the subcontractor making such kickbacks. Recovery from one offending party shall not preclude recovery from other offending parties.

ARTICLE XI. - FEDERALLY FUNDED PROCUREMENT

Contractor records.

If a district contract is being funded in whole or in part by assistance from a federal agency, the contract shall include provisions requiring the contractor and subcontractors at any tier to:

(1) Maintain for three years from the date of final payment under the contract all books, documents, papers, and records pertinent to the contract; and

(2) Provide to the district, the federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives access to such books, documents, papers, and records for the purposes of examining, auditing, and copying them.

Patents.

If a district contract involving research and development, experimental, or demonstration work is being funded in whole or in part by assistance from a federal agency, the contract shall include provisions:

(1) Giving notice to the contractor of the applicable grantor agency requirements and regulations concerning reporting of and rights to any discovery or invention arising out of the contract; and

(2) Requiring a contractor to include a similar provision in all subcontracts involving research and development, experimental, or demonstration work.

Copyrights and rights in data.

If a district contract is being funded in whole or in part by assistance from a federal agency, the contract shall include a provision giving the contractor notice of the applicable regulations concerning the rights of the United States to any plans, drawings, specifications, computer programs, technical reports, operating manuals, and similar work products developed and paid for under the contract.

Notice of federal public policy requirements.

If the district contract is being funded in whole or in part by assistance from a federal agency, and the contract is subject to one or more federal public policy requirements, such as: (i) equal employment opportunity; (ii) fair labor standards; (iii) energy conservation; (iv) environmental protection; or (v) other similar socioeconomic programs, the purchasing agent shall include contract provisions giving the contractor notice of these requirements and, where appropriate, including in those contract provisions the requirement that the contractor give a similar notice to all of its subcontractors.

Buy American requirements.

If a district contract is being funded in whole or in part by assistance from a federal agency, the district shall adhere to the appropriate buy American requirements of the federal agency providing the assistance.

Energy conservation.

If a district contract is being funded in whole or in part by assistance from a federal agency, the district's solicitation shall seek to promote energy conservation and shall comply with any mandatory standards and policies which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (PL 94-163).

Small, women-owned and minority business enterprises.

(a) Expand participation. If a district contract is being funded in whole or in part by assistance from a federal agency, the purchasing agent shall take affirmative steps to ensure that small, women-owned, and minority businesses are utilized when possible as sources of supplies, services, and construction items.

(b) Examples of affirmative steps. Affirmative steps to be taken shall include the following:

(1) Including qualified small, women-owned, and minority businesses on solicitation lists;

(2) Ensuring that small, women-owned, and minority businesses are solicited whenever they are potential sources;

(3) When economically feasible, dividing total requirements into smaller tasks or quantities to permit maximum small, women-owned, and minority business participation;

(4) Where the requirement permits, establishing delivery schedules which will encourage participation by small, women-owned, and minority business; and

(5) Using the services and assistance of the small business administration or the office of minority business enterprise of the department of commerce, as required.

(c) Pass-through to subcontracts. A contractor awarded a federally funded contract shall take the affirmative steps, as linked in subsection (b) of this section, in awarding its subcontracts.

Labor surplus area businesses.

If a district contract is being funded in whole or in part by assistance from a federal agency, the purchasing agent is encouraged to procure supplies, services, and construction items from businesses located in labor surplus areas.

Architectural and engineering services

(a) If a district contract is being funded in whole or in part by assistance from a federal agency, the district shall use qualifications-based competitive proposal procedures when contracting for Architectural and engineering services as defined in 40 U.S.C. §541 et seq. and 49 U.S.C. §5325(d). Services subject to this requirement include but are not necessarily limited to program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, and related services.

(b) Qualifications-based competitive proposal procedures require that:

(1) An offeror's qualifications be evaluated;

(2) Price be excluded as an evaluation factor;

(3) Negotiations be conducted with only the most qualified offeror; and

(4) Failing agreement on price, negotiations with the next most qualified offeror be conducted until a contract award can be made to the most qualified offeror whose price is fair and reasonable to the district.

(c) These qualifications-based competitive proposal procedures will be used for the procurement of the services listed above. This method of procurement will not be used to obtain other types of services even though a firm that provides architectural and engineering services is also a potential source to perform other types of services.

(d) The district will use article III, source selection and contract information, division 1, professional and technical services procurement to procure architectural and engineering services in accordance with the district's procurement code as amended.

Section II

Federal Transit Administration Best Practices Procurement Manual

Policies & Procedures for FTA Related Procurement

This document has been prepared in accordance with the Federal Transit Administration's (FTA) procurement policies. Please reference the FTA's Master Agreement for changes, assistance, and clarification. The Master Agreement contains standard terms and conditions governing the administration of a Project supported with Federal assistance awarded by the Federal Transit Administration (FTA) through a Grant Agreement or Cooperative Agreement with the Recipient, or supported through a loan, loan guarantee, or line of credit provided by FTA. Also, please refer to The FTA's Best Practices Procurement Manual for procurement assistance, contract clauses and provisions.

Written Record of Procurement History

The NCRTD Purchasing Office shall maintain records detailing the history of each FTA associated procurement. These records shall be placed in the master file and include:

- The rationale for the method of procurement (See - Decision Matrix);
- Selection of contract type;
- Reasons for contractor selection or rejection; and
- The basis for the contract price.

Procurement documentation files

Where appropriate, the file contains:

- Purchase request, acquisition planning information, and other pre-solicitation documents
- Evidence of availability of funds
- Rationale for the method of procurement (negotiations, formal advertising)
- List of sources solicited
- Independent cost estimate
- Description of work/scope of services
- Copies of published notices of proposed contract action
- Copy of the solicitation, all addenda, and all amendments

- Liquidated damages determination
- An abstract of each offer or quote
- Contractor's contingent fee representation and other certifications and representations
- Source selection documentation if applicable
- Contracting Officer's determination of contractor responsiveness and responsibility
- Cost or pricing data
- Determination that price is fair and reasonable including an analysis of the cost and price data, required internal approvals for award
- Purchase Requisition indicating availability of funding
- Notice of award
- Notice to unsuccessful bidders or offerors and record of any debriefing.
- Record of any protest
- Bid, Performance, Payment, or other bond documents, and notices to sureties
- Required insurance documents, and
- Notice to proceed

Contract Administration File

Where appropriate, the file contains:

- Purchasing Department Tracking Sheet
- Executed contract and notice of award
- Bond-related documents
- Insurance documentation
- Post-award correspondence
- Notice to proceed
- Approvals or disapprovals of waivers and deviations

• Modifications and changes in the terms or conditions of the contract, including a rationale for the change, determinations regarding their scope, and cost/price analysis of any price increases or decreases.

In order to ensure a sound and complete agreement, the Purchasing Agent will ensure the Contract/Purchase Order File Index is accurate, complete, and included in the master file. (Exhibit ???)

Awards to Responsible Contractors

The District shall make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed agreement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. The debarred and suspended list will also be checked.

Departments must submit the attached Responsibility Determination Form to the Purchasing Agent prior to the issuance of an award. (Exhibit ???)

Methods of solicitation and selection

The methods of solicitation and selection allowed within the Federal contractual sphere¹ are listed in § 9 of FTA Circular 4420.1E. You may choose:

• micro purchases only for contract amounts less than \$1,000;

• small purchase procedures only for contract amounts less than the simplified acquisition threshold (currently \$10,000);

• sealed bids where

° you have a complete, adequate, and realistic specification or purchase description

° two or more responsible bidders are willing and able to compete

° the procurement lends itself to a firm fixed price contract and the selection can be made primarily on the basis of price

° no discussion with bidders is needed after receipt of offers;

• competitive proposals; or

• noncompetitive proposals (sole source) procurement only if you can justify not soliciting additional competition in the manner explicitly defined in FTA Circular 4420.1E §9f.

• best value for contracts which indicate that the best value or the proposal which offers the greatest business value based upon an analysis of a tradeoff of qualitative technical factors and price/cost to derive which proposals represents the “best value” to the District’s procurement.

1 - See Section Best Practices Procurement Manual § 1.3.2, "Federal Contractual Sphere."

2 - FTA Circular 4220.1E §9.49 CFR

3 - Geographic preference is permitted in certain narrow situations, including principally where part of a legal licensing requirement and for architects and engineers; FTA Circular 4220.1E, §8.b.

4 - While the IFB requirements of § 9.c.(2) are good practices for both IFBs and RFPs, the evaluation criteria requirement of § 9.d.(1) is relevant only to RFPs and is discussed in Section 4.5.1, "Solicitation & Receipt of Proposals."

Departments must submit the attached Method of Procurement Decision Matrix Form to the Purchasing Agent to begin new procurement actions. The Decision Matrix will be placed in the master file. (Exhibit ???)

Micro-Purchases

Procurement by micro-purchases are those purchases under \$1,000.00. Purchases below that threshold may be made without obtaining competitive quotations if the grantee determines that the price is fair and reasonable. Such purchases are exempt from Buy America requirements. There should be equitable distribution among qualified suppliers, and no splitting of procurements to avoid competition. The Davis-Bacon Act applies to construction contracts over \$2,000.

Minimum documentation required: A determination that the price is fair and reasonable and how this determination was derived must be submitted to the Purchasing Agent prior to the issuance of an award. This determination shall be placed in the master file. Please use the Price and Cost Analysis Form (Exhibit???).

Small Purchases

Small purchase procedures are to be used if the services, supplies, or other property cost between \$1,000 and \$10,000. If small purchases procedures are used, price or rate quotations shall be obtained from at least three qualified sources and submitted to the Purchasing Agent prior to the issuance of an award. These price or rate quotations shall be placed in the master file. Please use the Price / Rate Quotation Form (Exhibit???)

Sealed Bids/Invitation for Bid (IFB)

Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming to all the material terms and conditions of the invitation for bids, is the lowest in price.

Note: Sealed bids are evaluated by the procuring department for compliance with bid specifications, responsible and responsive bidders, verification of pricing, fund availability, etc. The procuring department transmits an award recommendation to the Purchasing Department, which conditionally awards a contract.

In order for sealed bidding to be feasible, the following conditions should be present:

- a. A complete, adequate, and realistic specification or purchase description is available;
- b. Two or more responsible bidders are willing and able to compete effectively for the business;
- c. The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.
- d. No discussion with bidders is needed.

(2) If this procurement method is used, the following requirements apply:

- a. The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time to prepare bids prior to the date set for opening the bids;
- b. The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services sought in order for the bidder to properly respond;
- c. All bids will be publicly opened at the time and place prescribed in the invitation for bids;
- d. The Bid Summary Sheet, Bid Checklist, and Bid Cost Factors Forms (Exhibits ????) will be completed by the procuring department and forwarded to the Purchasing Department for review - to be placed in the master file;
- e. A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. When specified in bidding documents, factors such as discounts, transportation costs, and life cycle costs shall be considered in determining which bid is lowest;

(3) Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(4) The Purchasing Agent may reject any or all bids, or the procuring department requesting the procurement action, if there is a sound documented business reason. The Purchasing Agent or procuring department rejecting lower bids than the bid being accepted for award must provide a detailed written Determination of Findings outlining the reasons for rejection to the Purchasing Department for inclusion in the master file.

(5) The sealed bid method is the preferred method for procuring construction if the conditions in paragraph (1) above apply.

In determining which proposals is most advantageous, grantees may award (if consistent with State law) to the proposer whose proposals offer the greatest business value to the Agency based upon an analysis of a tradeoff of qualitative technical factors and price/cost to derive which proposal represents the "best value" to the Procuring Agency as defined in Section 6, Definitions. If the grantee elects to use the best value selection method as the basis for award, however, the solicitation must contain language which establishes that an award will be made on a "best value" basis.

Competitive Proposal/Request for Proposals (RFP)

The competitive proposal method of procurement is normally conducted with more than one source submitting an offer or proposal. Either a fixed price or cost reimbursement type contract is awarded. This method of procurement is generally used when conditions are not appropriate for the use of sealed bids (i.e. when descriptions of experience, education, expertise, availability of services, etc, are necessary for evaluation). If this procurement method is used the following requirements apply:

(1) Requests for proposals will be publicized.

(2) All evaluation factors will be identified and included along with their relative importance in the RFP. If scores are based on a uniform scale (i.e. 1-10, or 1-100), it is best to define in advance levels of compliance, skills, or proximity to the ideal that each step of the scale represents. (i.e. a bachelor's degree is worth 25 points, a master's degree is worth 50 points, and a doctorate is worth 100 points)

(3) Proposals will be solicited from an adequate number of qualified sources.

(4) Departments must have a written method in place for conducting technical evaluations of the proposals received and for selecting awardees. This documentation must be submitted to the Purchasing Agent for approval and inclusion in the master file.

(5) Awards will be made to the responsible firm whose proposal is most advantageous to the grantee's program with price and other factors considered. Other factors may include labor rates, specifications, labor hours, and delivery schedule. Documentation of the award justification should clearly identify key determination factors. Please use the Award Justification Form (Exhibit ????)

Architectural and Engineering Services (A&E)

The District shall use competitive proposal procedures based on the Brooks Act, paragraph 9-5e, when contracting for A&E services as defined in 40 U.S.C. §541 and 40 U.S.C. §5325(d).. The Brooks Act is federal policy relating to the selection of firms individuals to perform architectural, engineering, and related services. Other types of services considered A&E services include program management, construction management, feasibility studies, preliminary engineering, design, surveying, mapping, and services which require performance by a registered or licensed architect or engineer.

The Brooks Act requires that:

(1) An offeror's qualifications are evaluated;

(2) Price must be excluded as an evaluation factor;

(3) Negotiations be conducted with only the most qualified offeror; and

(4) Failing agreement on price, negotiations with the next most qualified offeror be conducted until a contract award can be made to the most qualified offeror whose price is fair and reasonable to the grantee. This "qualifications based procurement method" can only be used for the procurement of A&E services. This method of procurement cannot be used to obtain other

types of services even though a firm that provides A&E services is also a potential source to perform other types of services.

National Intelligent Transportation Systems Architecture and Standards. When requesting services for transportation system architecture, the District must ensure all offerors/bidders agree to conform, to the extent applicable, to the Intelligent Transportation System Architecture and Standards under the FHWA final rule, and with FTA Notice, "FTA National (ITS) Architecture Policy on Transit Projects and other subsequent Federal directives that may be issued.

Noncompetitive Proposals (Sole Source).

Sole Source procurements are accomplished through solicitation or acceptance of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. A contract amendment or change order that is not within the scope of the original contract is considered a sole source procurement that must comply with this subparagraph.

(1) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and at least one of the following circumstances applies:

(a) The item is available only from a single source;

(b) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(c) FTA authorizes noncompetitive negotiations;

(d) After solicitation of a number of sources, competition determined inadequate; or

(e) The item is an associated capital maintenance item as defined in 49 U.S.C. §5307(a)(1) that is procured directly from the original manufacturer or supplier of the item to be replaced. The grantee must first certify in writing to FTA: (i) that such manufacturer or supplier is the only source for such item; and (ii) that the price of such item is no higher than the price paid for such item by like customers.

(2) A cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profit, is required.

Best Value

Best Value is a selection process in which proposals contain both price and qualitative components, and award is based upon a combination of price and qualitative considerations. Qualitative considerations may include technical design, technical approach, quality of proposed personnel, and /or management plan. The award selection is based upon consideration of a combination of technical and price factors to determine the offer deemed most advantageous and of the greatest value to the District.

The Traditional Construction Process - Design/Bid/Build

It has been traditional in the construction industry to employ an architect/engineer (A/E) to complete a detailed design of the entire project before soliciting bids from construction

contractors. This traditional approach is known as sequential design and construction. This sequential design/construction approach requires that a detailed design package of the entire project be complete before bids are solicited from construction contractors. Following award of the construction contract, the A/E is often retained by the owner for the construction phase, and acts as the owner's agent, to inspect the construction work to ensure that the structures are built according to the designs and specifications.

Advantages - A major advantage of the sequential design and construction approach is that complex or one- of- a- kind projects can be thoroughly planned and thought through before construction begins. The traditional approach thus produces, in the design phase of the project, the most accurate estimate of final project costs, and this is an advantage of the traditional technique. If problems are encountered with design aspects for the latter stages of the project, the earlier design features or phases can be modified before any construction work has been done, thus avoiding construction contractor claims and delays. Another advantage is that the Agency is given a fixed price for completion of the entire project before construction begins. There may also be advantages in obtaining the necessary financing and project approvals. Overall management of the project should also be simplified by this approach.

Disadvantages - Sequential design and construction requires a longer time to complete the project than phased design and construction ("fast tracking"). And since time pressures are often the most intense issues confronting the Agency, the sequential method may not be feasible. Alternative contracting approaches have arisen to shorten the project completion time. These include phased design and construction ("fast tracking"), which often involves the use of a construction manager, and turnkey (design-build) contracting.

The Noncompetitive Procurement Justification Form and the Sole Source Cost Analysis Form (Exhibit "????") must be completed submitted to the Purchasing Agent prior to proceeding with this type of procurement.

Protest Procedures

1. The procedures established hereunder shall be available to contractors for the purpose of handling and resolving disputes relating to procurements hereunder. A protestor must exhaust all administrative remedies hereunder before pursuing a protest in any court of law. Where applicable, any information received under such procedures shall be disclosed to the Federal Transit Authority ("FTA") and a protestor must exhaust all administrative remedies before pursuing a protest with the FTA.
2. The term "contractor" means any person, firm, or corporation, which has contracted or seeks to contract (bidder or proposer) with the NCRTD.
3. The term "hearing officer" shall mean a person, appointed by the Executive Director, to hear and decide allegations made by any contractor relating to procurements hereunder.

Hearing Procedure

1. Any contractor may file a written protest of the procurement procedures involved herein, with the District's Purchasing Agent, within ten (10) days of the date of the District's Decision regarding a selection of a contractor with respect to a Bid/RFP/RFO.

2. A hearing shall be conducted in accordance with C.G.S. Section 4-176e through 4-18a, as amended, which are incorporated herein. The hearing officer shall issue a written decision within ninety (90) days of the last date of such hearing and state in the decision the reasons for the action taken.

3. Where applicable, review of protests by FTA will be limited to the District's failure to have or follow its procedures, or its failure to review a complaint or protest. An appeal to FTA must be received by the cognizant FTA regional or Headquarters Office within five (5) working days of the date the protestor knew or should have known of the violation.

Include the language contained in Appendix 1 in all Bids/RFP/RFO.

Costing and Pricing

Ensuring Most Efficient and Economic Purchase

Departments, during their annual budget process, should determine the procurement actions necessary to sustain their operations through the fiscal year. A list of these procurement actions should be forwarded to the Purchasing Agent annually.

Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase and to avoid purchase of unnecessary or duplicative items. Where appropriate, an analysis will be made of lease versus purchase alternatives and any other appropriate analysis to determine the most economical approach. The District considers various procurement sources to ensure economical purchases including, but not limited to GSA, State of New Mexico, and municipal cooperatives.

Independent Cost Estimates

Departments must perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation (FTA Circular 4420.1E Sec.10). Departments must make independent estimates before receiving bids or proposals. These estimates may be obtained from published competitive prices, results of competitive procurements, historical prices and trends, or by Purchasing Department estimates or outside estimators.

The Cost and Price Analysis Form must be submitted to the Purchasing Agent prior to issuing any solicitation. See Exhibit "???"

1. Cost Analysis

a. A cost analysis must be performed when the offeror is required to submit the elements (i.e., Labor Hours, Overhead, Materials, etc.) of the estimated cost, e.g., under professional consulting and architectural and engineering services contracts.

b. A cost analysis will be necessary when adequate price competition is lacking and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or on the basis of prices set by law or regulation.

2. Price Analysis

a. A price analysis may be used in all other instances to determine the reasonableness of the proposed contract price.

3. Profit

a. Departments will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed.

b. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

Federal Cost Principles

Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles. The Purchasing Agent may reference their own cost principles that comply with applicable Federal cost principles.

Cost Plus Percentage of Cost Prohibited

The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

Full and Open Competition

The principle of full and open competition has one primary and two secondary purposes. The primary purpose is to obtain the best quality and service at minimum cost. In other words, to get the best buy. The secondary purposes are to guard against favoritism and profiteering at public expense and to provide equal opportunities to participate in public business to every potential offeror.

Departments must conduct all procurement in a manner providing full and open competition. This policy assures that all responsible bidders are permitted to compete for the procurement. In the case of sole or single source procurement, justification for use of the source must be documented on the Noncompetitive Procurement Justification Form (Exhibit ???). Also see Sole Source Contracting Section.

Contracts with a value of more than \$100,000 shall be awarded by sealed bid or by the competitive and noncompetitive proposal process unless there is an explicit exception. Departments must refrain from the following practices, which are deemed restrictive of competition:

a. Unreasonable requirements placed on firms in order for them to qualify to do business;

b. Unnecessary experience and excessive bonding requirements;

c. Noncompetitive pricing practices between firms or between affiliated companies;

d. Noncompetitive awards to any person or firm on retainer contracts;

e. Organizational conflicts of interest;

f. Restrictive use of brand names;

g. Any arbitrary action in the procurement process; and

h. Geographic preferences.

All departments must submit all required forms to the Purchasing Agent prior to issuance of an award letter.

Bonding Requirements

For those construction or facility improvement contracts or subcontracts exceeding \$100,000, FTA may accept the bonding policy and requirements of the grantee, provided FTA determined that the policy and requirements adequately protect the Federal interest. FTA has determined that grantee policies and requirements that meet the following minimum criteria adequately protect the Federal interest. Please refer to the FTA Bonding Requirements paragraph 11, as cited below.

a. A bid guarantee from each bidder equivalent to five (5) percent of the bid price. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified;

b. A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract; and

c. A payment bond on the part of the contractor. A payment bond is one executed in connection with a contract to assure payment, as required by law, of all persons supplying labor and material in the execution of the work provided for in the contract. Payment bond amounts determined to adequately protect the federal interest are as follows:

(1) Fifty percent of the contract price if the contract price is not more than \$1 million;

(2) Forty percent of the contract price if the contract price is more than \$1 million but not more than \$5 million; or

(3) Two and a half million dollars if the contract price is more than \$5 million.

d. A Grantee may seek FTA approval of its bonding policy and requirements if they do not comply with these criteria.

Brand Name or Equals

Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not contain features unduly restricting competition. The description may include a statement of the qualitative nature of the material, product, or service to be procured and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used.

Departments shall use a "brand name or equal" description only when it cannot provide an adequate specification or more detailed description, without performing an inspection and analysis, in time for the acquisition under consideration. Further, a department wishing to use "brand name or equal" must carefully identify its minimum needs and clearly set forth those salient physical and functional characteristics of the brand name product in the solicitation.

Conflicts of Interest

Employees, officers, board members, or agents of the NCRTD are prohibited from participating in the selection, award, or administration of contracts or sub-agreements supported by federal funds if a real or apparent conflict of interest exists.

The following language must be included in all RFPs for design and evaluation services covered under this section. This statement prohibits contractors from bidding on follow-up (add on) construction work resulting from the design.

"In order to prevent real or apparent conflicts of interest, the District prohibits contractors that have participated in FTA-funded design or evaluation services from bidding on any resulting construction work, services, or capital equipment purchases. All specifications prepared by design consultants must be written in such a manner that any reasonable, competent contractor could understand the requirement and perform the work"

Geographic Preferences

Departments shall conduct procurements in a manner that prohibits the use of statutory or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. This does not preempt State licensing laws. However, geographic location may be a selection criterion in procurements for architectural and engineering (A&E) services, provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

Written Selection Procedures

To ensure all procurements are awarded in a fair and equitable manner, all solicitations shall:

a. Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not contain features that unduly restrict competition. The description may include a statement of the qualitative nature of the material,

product, or service to be procured and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use.

b. Identify all requirements that offerors must fulfill and all other factors to be used in evaluating bids or proposals.

Evaluators and reviewers must follow the established criteria when rating the proposals.

Prequalification of Bidders

The procuring department shall ensure that all lists of prequalified persons, firms, or products that are used in acquiring goods and services are current and include enough qualified sources to ensure maximum full and open competition. In addition, the District shall not preclude potential bidders from qualifying during the solicitation period, which is from issuance of the solicitation to its closing date.

Advertising and Publicizing Solicitation

IFBs and RFPs must be publicly advertised and publicized (respectively) at least fourteen (14) days prior to the solicitation's due date. A longer time period is suggested for larger, more complex procurements. Outreach efforts must be made using diverse resources such as the Internet and mailing lists coupled with widely circulated publications.

IFBs must be issued with sufficient time to prepare bids prior to the date set for opening the bids. Further, the invitation for bids will include any specifications and pertinent attachments and shall properly define the items or services sought in order for the bidder to properly respond. RFPs must identify all evaluation factors along with their relative importance. The Purchasing Agent shall place copies of all advertising and publicized solicitation material in the related master file.

Pre-Bid and Pre-Proposal Conferences

Pre-bid and pre-proposal conferences are generally used in complex acquisitions as a means of briefing prospective offerors and explaining complicated specifications and requirements to them as early as possible after the solicitation has been issued and before offers are received. This is also an open forum for potential respondents to address ambiguities in the solicitation documents that may require clarification. Notice of the conference is included in the solicitation at the time of issuance.

Evaluations of Bid Alternates

When bid alternates are included in a bid or proposal document, these alternates must be evaluated as part of the overall bid. This evaluation must be in a written narrative detailing the contract award and takes the alternate into account in reaching a procurement decision. This evaluation must be submitted to the Purchasing Department prior to proceeding with the procurement.

Exercise of Bid Alternates

Bid Alternates may not be exercised unless it is in accordance with the terms and conditions stated in the initial contract. In addition, the requesting department must have made a determination that the alternate price is better than the market price or that the option price is

more advantageous. Full written documentation supporting this determination must be submitted to the Purchasing Department.

Types of Contracts

General

All FTA related procurements must use the Contract/Purchase Order File Index Forms as provided in the appendix. These checklists will be used by the Purchasing Agent to ensure contract clauses and federal flow down language are included in each contract as required.

Fixed Price v. Cost Reimbursement

Procurement by the Sealed Bid/Invitation for Bids (IFB) method when certain conditions are present. Among those listed is the condition that:

- a. The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.
- b. Paragraph 9.d of FTA Circular 4420.1E authorizes procurement by the Competitive Proposal/Request for Proposals (RFP) method and either a fixed price or cost reimbursement type contract may be awarded.
- c. Paragraph 7.i of FTA Circular 4420.1E requires that departments must document their reasons for selecting the contract type as a part of the written record of procurement history.
- d. Paragraph 10.e of FTA Circular 4420.1E prohibits the cost plus a percentage of cost method of contracting.

There are two broad categories of contract types: fixed-price contracts and cost-reimbursement contracts. Within these two families of contract types there are a number of subtypes offering differing degrees of incentives. At the extremes are the firm-fixed-price contract, in which the contractor has complete responsibility for the costs of performance and the resulting profit or loss, and the cost-plus-fixed-fee contract, in which the contractor has virtually no risk for performance costs and the fee (profit) is fixed. Between these two extremes are the various incentive-type contracts where the degree of cost risk and profit incentive can be tailored to meet almost any specific program situation.

Fixed-price contracts

These contracts are appropriate for acquiring commercial items, or for supplies or services which can be clearly defined with either performance/functional specifications or design specifications, and where performance uncertainties do not impose unreasonably high risks upon the contractor.

Cost-reimbursement contracts

These contracts are one in which the District does not contract for the performance of a specified amount of work for a predetermined price, but agrees instead to pay the contractor's reasonable, allocable and allowable costs of performance regardless of whether the work is completed. The District/Department assumes a high risk of incurring cost overruns, while the contractor has almost no risk of financial losses. Cost-type contracts are suitable when (a) you are unable to

accurately describe the work to be done, or (b) there is an inability to accurately estimate the costs of performance. If either of these conditions is present, the cost-reimbursement contract is the proper type of contract. Cost-type contracts are ideally suited to complex requirements because the parties can devote their attention to accomplishing the work rather than on the claims process, which will be significant on larger, complex projects.

Time and Materials Contracts

Departments will use time and materials contracts only:

(1) After a determination that no other type of contract is suitable;

(2) The contract specifies a ceiling price, and the contractor shall not exceed that price except at its own risk; and

(3) The Method of Procurement Decision Matrix Form (Exhibit ????) must be submitted to the Purchasing Agent and included with the file for this type of contract.

Labor / Hour Contracts

Labor / hour contracts are a variation of the time and materials contract, differing only in that materials are not supplied by the contractor. You should use this type of contract only when no other would be suitable, and you need to document your determination if you choose to use this type of contract.

Cost Plus Percentage of Cost Contracts (CPPC)

The FTA Circular 4420.1E clearly prohibits the use of this contracting method.

Out of Scope Changes

An “out of scope change” is a contract amendment or change order that is not within the scope of the original contract is considered a sole source procurement. Please use the sole source policies for this type of action. FTA Circular 4220.1E, paragraph 9(f).

Contract Term Limitation

The District shall not enter into any contract for rolling stock or replacement parts with a period of performance exceeding five (5) years inclusive of options. All other types of contracts (supply, service, leases of real property, revenue and construction, etc.) will be based on sound business judgment. Length of contracts shall be for not more than the amount of time required to accomplish the purpose of the contract, and will also include consideration for competition, pricing, fairness, and public perception. Once a contract has been awarded, an extension of the contract term length that amounts to an out of scope change, will require a sole source justification.

Revenue Contract

Revenue contracts are those third party contracts whose primary purpose is to either generate revenues in connection with a transit related activity, or to create business opportunities utilizing an FTA funded asset. FTA requires these contracts to be awarded utilizing competitive selection

procedures and principles. The extent of and type of competition required is within the discretionary judgment of the District.

Tag-ons

The use of tag-ons, or the addition of work including supplies, equipment or services, that is beyond the scope of the original contract that amounts to a cardinal change as generally interpreted in Federal practice by the various Boards of Contract Appeals, is prohibited and applies to the original buyer as well as to others. In scope "tag-on" changes are not considered tag-ons.

Piggybacking

Piggybacking is an assignment of existing contract rights to purchase supplies, equipment or services. Piggybacking is permissible when the solicitation document and resultant contract contain an assign ability clause that provides for the assignment of all or a portion of the specified deliverables as originally advertised, completed, evaluated, and awarded. If the supplies were solicited, competed and awarded through the use of an indefinite-delivery-indefinite-quantity (IDIQ) contract, then both the solicitation and contract award must contain both a minimum and a maximum quantity that represents the reasonably foreseeable needs of the party(s) to the solicitation and contract. If the District and another party jointly solicit and award an IDIQ contract, then there must be a total minimum and maximum.

E-Commerce

E-Commerce is an allowable means to conduct procurements. If an E-Commerce solicitation will be utilized, full and open competition must be addressed in compliance with the Federal Circular 4200.1E. A written procedure will be required prior to use of E-Commerce. Please call the Purchasing Office prior to use of this alternative.

Payments

Advance Payments

FTA does not authorize, and will not participate in funding payments to a contractor prior to the incurrence of costs by the contractor unless prior written concurrence is obtained from FTA.

Progress Payments

Grantees may use progress payments provided the following requirements are followed:

- (1) Progress payments are only made to the contractor for costs incurred in the performance of the contract.
- (2) The grantee must obtain adequate security for progress payments adequate security may include taking title, letter of credit or equivalent means to protect the grantee's interest in the progress payment.

Contract Provisions

All contracts shall include provisions to define a sound and complete agreement. In addition, contracts and subcontracts shall contain contractual provisions or conditions that allow for:

a. Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, including sanctions and penalties as may be appropriate. (All contracts in excess of the small purchase threshold.)

b. Termination for cause and for convenience by the District or sub grantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of \$10,000.)

Liquidated Damages Provisions

The District may use liquidated damages if it may reasonably expect to suffer damages (increased costs on project involved) from late completion and the extent or amount of such damages would be difficult or impossible to determine. In order to obtain liquidated damages, the District must suffer an actual loss. The amount of liquidated damages must be reasonable in light of the loss suffered. The assessment for damages shall be at a specific rate per day for each day of overrun in contract time; and the rate must be specified in the third party contract. Any liquidated damages recovered shall be credited to the project account involved unless the FTA permits otherwise.

Architectural and Engineering Services Conflicts of Interest

The following language must be included in all RFPs for design and evaluation services covered under this section. This statement prohibits contractors from bidding on follow-up (add on) construction work resulting from the design.

“In order to prevent real or apparent conflicts of interest, the District prohibits contractors that have participated in FTA-funded design or evaluation services from bidding on any resulting construction work, services, or capital equipment purchases. All specifications prepared by design consultants must be written in such a manner that any reasonable, competent contractor could understand the requirement and perform the work.”

Flow down of FTA Clauses

Please see the attached FTA Contract Clauses as a guide to ensure the proper clauses are included in the procurement process. These clauses are required to be included in all FTA contracts and purchase orders. See Exhibit “???”

A full text of all Contract Clauses from FTA Best Practices Manual may be found here.

Buy America

As a condition of responsiveness to bidding for procurements of rolling stock, iron, steel, or manufactured products greater than \$100,000 the bidder must submit with the bid or offer, a completed Buy America certificate in accordance with Part 661.6 for steel, iron, and manufactured products, or Part 661.12 for rolling stock (including train control, traction power, and communication equipment). Once submitted the bidder is bound by the certification provided. If the bidder does not submit a certification, the bid shall be considered non-responsive. If the bidder executes certification that it cannot comply but may be eligible for an exception,

then the District shall review the circumstances and determine if it should request a waiver from the FTA. There are specific instances included in the regulations for waiver of Buy America provisions including that it is in the public's best interest, that there are no U.S. products available, or there is a 25 percent price difference between the foreign and domestic products.

See FTA's Buy America web page http://www.fta.dot.gov/legal/buy_america/14456_ENG_HTML.htm for additional information on requirements.

Certifications in compliance with Part 661.6 and 661.12 are provided in Exhibit "???"

Lobbying

Contractors who apply or bid for an award of \$100,000 or more must file the certification required by 49 CFR part 20, "New Restrictions on Lobbying." Each level of FTA fund recipient certifies to the level above it that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each FTA fund recipient must also disclose the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on its behalf with non-Federal funds with respect to that specific Federal contract, grant or award covered by 31 U.S.C. 1352. Such disclosures are forwarded from each level of fund recipient to the next level of fund recipient until it reaches the grantor.

See "Lobbying" as provided in <http://www.fta.dot.gov/library/admin/BPPM/appA1.html#BM10>.

Certifications attached as Exhibit "???"

FTA Federally Required and Other Model Contract Clauses – Exhibit???

(b)

59. Severability.

If any provision or application of these regulations is held invalid, such invalidity shall not affect any other provision or application of these regulations which be given effect without the invalid provision or application.

60. Effective Date.

This Resolution shall be effective upon adoption.

ADOPTED this ____ day of _____, 20142.

North Central Regional Transit District

Daniel Barrone, Chairman

Approved as to form:

Peter Dwyer, Counsel